



(16,807.)

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 594.

MAUDE E. KIMBALL, PLAINTIFF IN ERROR,

*vs.*HARRIET A. KIMBALL, JOHN S. JAMES, AND HARRIET  
I. JAMES.IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF KINGS  
STATE OF NEW YORK.

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a Court of Appeals, State of New York.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, &c.

Papers on appeal from order.

W. Harlock, attorney for Maude E. Kimball, petitioner and appellant, 20 Nassau street, New York city.

Arnold & Greene, attorneys for Harriet A. Kimball and others, respondents, 3 Broad street, New York city.

1 In the Supreme Court, Appellate Division, Second Judicial Department.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Statement under Rule 41.*

This proceeding was begun December 18, 1896.

The petition was served December 21, 1896.

The answer was served January 6, 1897.

The reply was served January 20, 1897.

The name of the original petitioner is Maude E. Kimball.

The names of the original respondents are Harriet A. Kimball and John S. James, as administratrix and administrator, &c., of Edward C. Kimball, deceased, and Harriet I. James.

There has been no change of the parties.

2 At a surrogate's court, held in and for the county of Kings, at the surrogate's court-room, in the hall of records, in the city of Brooklyn, on the 18th day of December, 1896.

Present: Hon. George B. Abbott, surrogate.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Order for Citation.*

On reading and filing the verified petition of Maude E. Kimball praying for a decree revoking letters of administration of the goods, chattels and credits which were of said deceased to Harriet A. Kimball and John S. James, issued to them by the surrogate of Kings county on the 10th day of November, 1896, and praying that letters of ad-

ministration be issued to her, the said Maude E. Kimball, and that a citation issue to the parties interested, and upon proof by the affidavits of Maude E. Kimball, Mame F. Cavendy and William B. Smith annexed to said petition, satisfactory to me, of the truth of the allegations contained therein, and on the petition and all the proceedings heretofore had upon the granting of said letters to Harriet A. Kimball and John S. James—

It is hereby ordered that a citation issue herein to the said Harriet A. Kimball and John S. James and Harriet I. James  
 3 requiring them to show cause, on a day and hour to be named in said citation, before the surrogate of Kings county, why the prayer of said petition of said Maude E. Kimball should not be granted, and why the petitioner should not have such other relief as may be just; and in the meantime, and until further order herein, all proceedings on the part of said Harriet A. Kimball and John S. James, or either of them, as such administratrix and administrator, are hereby stayed, and let such citation so provide.

GEO. B. ABBOTT, *Surrogate*.

#### Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

#### *Petition to Revoke Letters of Administration.*

To the surrogate's court of the county of Kings:

The petition of Maude E. Kimball respectfully shows:

That your petitioner is a resident of No. 1170 Dean street, in the city of Brooklyn, in the county of Kings, in the State of New York, and is the widow of said Edward C. Kimball, deceased, and is of full age.

4 That said deceased departed this life at the city of Brooklyn aforesaid on the ninth day of November, 1896, and was at the time of his death, and immediately previous thereto, a resident of the county of Kings.

That your petitioner has made diligent search and inquiry for a will of said deceased, but has not found any, nor obtained any information that he left any; and she therefore alleges, upon information and belief, that said deceased died without leaving any last will and testament.

That said deceased died a natural death and that your petitioner saw the remains of said deceased after his death.

That said deceased, at the time of his death, was possessed and the owner of certain personal property, the value of which does not exceed the sum of ten thousand dollars.

That said deceased, at the time of his death, was seized of real estate the value of which is about four thousand dollars, which real

estate is subject to the dower interest of Harriet A. Kimball, the mother of said deceased.

That the names of the next of kin of the decedent, as far as they are known to your petitioner, or can be ascertained by her with due diligence, are as follows: Harriet A. Kimball, the mother of said deceased, and Harriet I. James (wife of John S. James), the sister of said deceased, both of whom reside at No. 6 Pierrepont street, in the city of Brooklyn.

That said deceased left him surviving no father, child, adopted child, child of a deceased child, brother or sister other than said Harriet I. James, and no nephew or niece, the child of any deceased brother or sister.

That your petitioner has read the petition herein of said Harriet A. Kimball, dated November 10th, 1896, upon which said letters of administration were issued to her and said John S. James, and your petitioner alleges that the statement in said petition in the words,

5 "and your petitioner is informed and believes that he (meaning decedent) was unmarried at the time of his death and left him surviving no widow," was and is false and untrue, and that said Harriet A. Kimball well knew that the same was false and untrue at the time she made and verified said petition.

That your petitioner is the lawful widow of the said Edward C. Kimball, deceased, and was not a party to the proceedings had upon the said petition of Harriet A. Kimball as aforesaid, and knew nothing about the same prior to the issuing of said letters of administration to said Harriet A. Kimball and John S. James, and that no citation was ever issued or served upon your petitioner in the matter of said application of Harriet A. Kimball.

That your petitioner was duly married to the said Edward C. Kimball, deceased, according to the laws of the State of New York, at No. 400 Putnam avenue, in the said city of Brooklyn, on the 29th day of June, 1895, by the Reverend W. C. P. Rhoades, pastor of the Marcy Avenue Baptist church of the city of Brooklyn, a minister of the gospel duly authorized by law to perform the ceremony of marriage, and your petitioner remained the wife of said Edward C. Kimball until his death on the 9th day of November, 1896.

That after her said marriage your petitioner and the said Edward C. Kimball lived together as man and wife as follows: At Seacliff, Long island, during the summer and until about September 7th, 1895, when the decedent and your petitioner went to housekeeping at No. 483 Decatur street, Brooklyn, N. Y., where they lived together until about January 3d, 1896, at which last-mentioned date the decedent went to Easton, Pennsylvania, to engage in business there, and owing to his failure to support your petitioner, she was compelled to return to her mother's home about that time.

That immediately after the marriage aforesaid, your petitioner was introduced to the decedent's mother, Harriet A. Kimball, by the decedent, as his wife. That said Harriet A. Kimball always treated your petitioner affectionately and cordially, and for several months in the fall of 1895 she dined once a week at your petitioner's home,

at No. 483 Decatur street aforesaid, with your petitioner, and  
 6 on each of said visits she remained several hours. That said  
 Harriet A. Kimball gave your petitioner various articles of  
 silverware and of household furnishings for use in her said home,  
 also some pictures, including a portrait of herself, taken when she  
 was fifteen years old, and a portrait of her grandmother; and at her  
 request your petitioner visited her several times at her residence,  
 and was introduced there by said Harriet A. Kimball to her friends  
 and acquaintances as the wife of her son, the decedent.

Wherefore, your petitioner prays for a decree revoking the said  
 letters of administration heretofore issued to Harriet A. Kimball  
 and John S. James, and awarding to your petitioner letters of  
 administration of the goods, chattels, and credits which were of said  
 deceased; and that said Harriet A. Kimball and John S. James and  
 Harriet I. James, the sister of said deceased, may be cited to show  
 cause why such a decree should not be made, and why your peti-  
 tioner should not have such further and other relief as may be meet;  
 and that in the meantime and until the further order of this court,  
 the said Harriet A. Kimball and John S. James, and each of them,  
 be restrained and enjoined from further acting as administratrix  
 and administrator respectively in the premises.

Dated the 17th day of December, 1896.

MAUDE E. KIMBALL, *Petitioner.*

WALDEGRAVE HARLOCK,

*Attorney for Petitioner, 20 Nassau Street, New York City.*

STATE OF NEW YORK, }  
 City and County of New York, } ss:

Maude E. Kimball, the above-named petitioner, being duly sworn,  
 doth depose and say that she has read the foregoing petition sub-  
 scribed by her, and that the same is true of her own knowledge,  
 except as to the matters therein stated to be alleged on infor-  
 7 mation and belief, and as to those matters she believes it to  
 be true.

MAUDE E. KIMBALL.

Subscribed and sworn — before me this 17th day of December,  
 1896.

F. W. LONGFELLOW,  
*Notary Public (55), New York County, N. Y.*

## Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Affidavit in Support of Petition.*

CITY AND COUNTY OF NEW YORK, ss:

Maude E. Kimball, being duly sworn, says: I am the petitioner herein, and I hereby repeat and reaffirm all the allegations in the petition herein verified by me this day.

I reside at No. 1170 Dean street, in the city of Brooklyn, Kings county, New York, and am the widow of Edward C. Kimball, deceased, and am of full age.

Said Edward C. Kimball died at the said city of Brooklyn 8 on the 9th day of November, 1896, intestate, and leaving him surviving no child or other descendant, and his only next of kin are his mother, Harriet A. Kimball, and his sister, Harriet I. James, both of whom reside in the said city of Brooklyn. At the time of his death he was the owner of personal property of the value of about \$10,000 and had an interest in real estate of the value of about \$3,000.

Letters of administration on the estate of said Edward C. Kimball were issued by the surrogate of Kings county on the 10th day of November, 1896, to said Harriet A. Kimball and to John S. James upon the petition of said Harriet A. Kimball, without notice or citation to me or my consent; and said petition of Harriet A. Kimball contains a false suggestion of a material fact, to wit, the allegation "that the deceased was unmarried at the time of his death, and left him surviving no widow."

I was duly married to said Edward C. Kimball on the 29th day of June, 1895, at No. 400 Putnam avenue, in the said city of Brooklyn, by the Reverend W. C. P. Rhoades, pastor of the Marcy Avenue Baptist church, a minister of the gospel duly authorized by law to perform the ceremony of marriage, and the said marriage was performed in the presence of W. B. Smith and Miss M. F. Cavendy; and at the time thereof the said the Reverend W. C. P. Rhoades delivered to me a certificate of said marriage signed by him, and also signed by said W. B. Smith and Miss M. F. Cavendy as witnesses thereto, which certificate was in the words and figures following, viz:

"This certifies that on the twenty-ninth day of June, in the year of our Lord 1895, Edward C. Kimball and Maude E. Semon were by me united in marriage at 400 Putnam avenue, Brooklyn, according to the laws of the State of New York.

"W. C. P. RHOADES.

"Witnesses:

"W. B. SMITH.

"Miss M. F. CAVENDY."

9 Said Edward C. Kimball and I lived together as man and wife from and after said marriage, and said marriage was never dissolved or annul-ed, and at the time of the death of said Edward C. Kimball I was his lawful wife.

After our said marriage my husband, said Edward C. Kimball, and I lived together as man and wife as follows: At Seacliff, Long island, during the summer and until about September 7th, 1895, when we went to housekeeping at No. 483 Decatur street, Brooklyn, in a house owned by my own mother and furnished mostly by her for the use of myself and my said husband, where we lived until about January 3d, 1896, when my husband went to Easton, Pennsylvania, to engage in business there. As my husband was not successful in business I was compelled to close said Decatur Street house and go to live with my mother about February 1st, 1896.

Immediately after our marriage, as aforesaid, I was introduced to the said Harriet A. Kimball by my said husband as his wife and she visited us at Seacliff and also at our home at No. 483 Decatur street aforesaid. Said Harriet A. Kimball always treated me with respect and affection, and while we were living at our Decatur Street home said Harriet A. Kimball dined with us there on the Tuesday of almost every week, and stayed with us until late in the evening. She gave to me as presents for use in our said home some of her family pictures including a portrait of herself taken when she was a girl of about fifteen years, and also a picture of her own grandmother. She also gave me for like use some silverware, which had been in her family for many years, consisting of a tea set, cake basket and butter dish, also blankets, sheets, towels, lace curtains, and other things for housekeeping.

At the request of said Harriet A. Kimball I visited her at her residence in Third street, Brooklyn, with my husband, and was introduced by her there as the wife of said Edward C. Kimball to several old friends and acquaintances of her family.

10 After my said husband went to Easton, as aforesaid, said Harriet A. Kimball called on me at our Decatur Street home about once a week, and told me that she did so for the purpose of cheering me up during my husband's absence.

MAUDE E. KIMBALL.

Subscribed and sworn to before me this 17th day of December, 1896.

F. W. LONGFELLOW,  
*Notary Public (55), New York County, N. Y.*



## Kings County Surrogate's Court.

In the Matter of of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Affidavit in Support of Petition.*

STATE OF NEW YORK, }  
City and County of New York, } ss:

Mame F. Cavendy, of the city of Brooklyn, being duly sworn, deposes and says that she is well acquainted with Maude E. Kimball, the petitioner herein, and was also well acquainted with her deceased husband, Edward C. Kimball, during his lifetime, and was, on the 29th day of June, 1895, at the residence of the

11 Reverend W. C. P. Rhoades, the pastor of the Marcy Avenue Baptist church, in the city of Brooklyn, and was present at the marriage by the said the Reverend W. C. P. Rhoades of the said Maude E. Kimball to the said Edward C. Kimball at said time and place, and that deponent subscribed her name on the certificate of said marriage, signed by said pastor, as a witness thereof.

Deponent further says that William B. Smith, who was also present at said marriage, likewise subscribed his name on said certificate of marriage as a witness thereof.

MAME F. CAVENDY.

Subscribed and sworn to before me this 17th day of December, 1896.

WM. H. H. PINCKNEY,  
Notary Public, Kings County.

## Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Affidavit in Support of Petition.*

STATE OF NEW YORK, }  
City and County of New York, } ss:

12 William B. Smith, of the city of New York, being duly sworn, deposes and says that he is well acquainted with Maude E. Kimball, the petitioner herein, and was also well acquainted with her deceased husband, Edward C. Kimball, during his lifetime, and was on the 29th day of June, 1895, at the residence of the Reverend W. C. P. Rhoades, the pastor of the Marcy Avenue Baptist church, in the city of Brooklyn, and was present at the marriage by the said Reverend W. C. P. Rhoades of the said Maude



E. Kimball to the said Edward C. Kimball at said time and place, and that deponent subscribed his name on the certificate of said marriage signed by said pastor as a witness thereof.

Deponent further says that Mame F. Cavendy, who was also present at said marriage, likewise subscribed her name on said certificate of marriage as a witness thereof.

W. B. SMITH.

Subscribed and sworn to before me this 17th day of December, 1896.

WILLIAM FRANCIS CAREY,  
*Notary Public (95), N. Y. Co.*

*Citation.*

The People of the State of New York, by the grace of God free and independent, to Harriet A. Kimball and John S. James, as administratrix and administrator of the goods, chattels, and credits which were of Edward C. Kimball, deceased, and to Harriet I. James, sister of said deceased, send greeting:

You, and each of you, are hereby cited and required to appear before our surrogate of the county of Kings, at a surrogate's court of the county of Kings, to be held at the Hall of Records, in the city of Brooklyn, on the sixth day of January, 1897, at ten  
13 o'clock in the forenoon, then and there to show cause why a decree should not be made revoking the letters of administration of the goods, chattels and credits which were of said Edward C. Kimball, deceased, heretofore and on the 10th day of November, 1896, issued to said Harriet A. Kimball and John S. James by the surrogate's court of the county of Kings; and why letters of administration on the estate of said deceased Edward C. Kimball should not be issued to Maude E. Kimball, as the widow of said deceased. And in the meantime, and until the further order of said court, all proceedings on the part of said Harriet A. Kimball and John S. James, or either of them, as such administratrix and administrator, are hereby stayed.

In testimony whereof, we have caused the seal of our said surrogate's court to be hereunto affixed.

[L. s.] Witness, Hon. George B. Abbott, surrogate of our said county, at the city of Brooklyn, the nineteenth day of December, in the year of our Lord one thousand eight hundred and ninety-six.

JOSEPH W. CARROLL,  
*Clerk of the Surrogate's Court.*

*Proof of Service.*

STATE OF NEW YORK, }  
*City and County of New York,* } ss:

Rudolph H. Ehrsam, being duly sworn, deposes and says that he resides at No. 172 East Eighty-seventh street, in the city of New

York, and is over twenty-one years of age. That on the twenty-first day of December, 1896, deponent served the within citation upon Harriet A. Kimball and Harriet I. James, two of the persons mentioned in said citation, at No. 6 Pierrepont street, in the city of Brooklyn, Kings county, and upon John S. Jaems, one of the persons mentioned in said citation, at No. 10 Wall street, in the city of New York, in the county of New York, by delivering to and leaving with each of said persons a copy of said citation, and at the same time exhibiting to each of said persons the original citation within, and at the same time deponent delivered to each of said persons a copy of the order of the surrogate's court of the county of Kings, made herein, bearing date the 18th day of December, 1896, directing that the said citation issue, and at the same time deponent also delivered to each of said persons a copy of the petition and affidavit of Maude E. Kimball and affidavits of Mame F. Cavendy and William B. Smith, referred to in said order and annexed thereto; deponent further says that he knew the said Harriet A. Kimball, Harriet I. James and John S. James, served by him as aforesaid, to be the persons mentioned in said citation, and to whom it was addressed.

RUDOLPH H. EHRSAM.

Subscribed and sworn to before me this 21st day of December, 1896.

F. W. LONGFELLOW,  
*Notary Public (55), New York County, N. Y.*

15 Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased.

*Petition of Harriet A. Kimball for Administration.*

To the surrogate's court of the county of Kings:

The petition of Harriet A. Kimball respectfully shows:

That your petitioner is a resident of No. 6 Pierrepont street, in the city of Brooklyn, and is the mother of the said Edward C. Kimball, deceased, and is of full age.

That said deceased departed this life at the city of Brooklyn on the ninth day of November, 1896, and was at, or immediately previously to his death, a resident of the county of Kings.

That your petitioner has made diligent search and inquiry for a will of said deceased and has not found any or obtained any information that he left any, and, therefore, alleges upon information and belief that said deceased died without leaving any last will and testament.

That said deceased died a natural death, and that your petitioner saw the remains of said deceased after his death.

That said deceased at the time of his death was possessed and the

owner of certain personal property, the value of which does not exceed the sum of ten thousand dollars.

16 That said deceased at the time of his death was seized of real estate, the value of which is about four thousand dollars, which real estate is subject to your petitioner's dower interest.

That the names of the husband or widow and the next of kin of the decedent, as far as they are known to your petitioner or can be ascertained by her with due diligence, are as follows:

Harriet A. Kimball, your petitioner, who is the mother of said deceased, and Harriet I. James, wife of John S. James, the sister of said deceased.

Said deceased left him surviving no father, children, adopted child, child of a deceased child, brother or sister, other than said Harriet I. James, and no nephew or niece, the child of any deceased brother or sister, and your petitioner is informed and believes that he was unmarried at the time of his death and left him surviving no widow.

That said Harriet I. James has renounced any right she may have to letters of administration of the goods, chattels and credits of said deceased.

Your petitioner, therefore, prays for a decree of the surrogate's court of the county of Kings, awarding letters of administration of the goods, chattels and credits which were of said deceased to her and to said John S. James, who, deponent prays, may be joined with her as administrator of said goods, chattels and credits of said deceased.

Dated the 10th day of November, 1896.

HARRIET A. KIMBALL.

STATE OF NEW YORK, }  
County of Kings, } ss:

Harriet A. Kimball, the above-named petitioner, being duly sworn, doth depose and say, that she has read the foregoing petition subscribed by her, and that the same is true of her own  
17 knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

HARRIET A. KIMBALL.

Subscribed and sworn this 10th day of November, 1896.

EDWARD J. BERGEN,

*Notary Public.*

STATE OF NEW YORK, }  
County of Kings, } ss:

We, Harriet A. Kimball and John S. James, do solemnly swear and declare that we will well, faithfully and honestly discharge the duties of administratrix and administrator of the goods, chattels and credits which were of Edward C. Kimball, deceased, according to law.

HARRIET A. KIMBALL.  
JOHN S. JAMES.

Subscribed and sworn this 10th day of November, 1896.

EDWARD J. BERGEN,  
Notary Public.

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Kings County Surrogate's Court.

In the Matter of the Applicant for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased.

*Renunciation.*

I, Harriet I. James, wife of John S. James, of No. 6 Pierrepont street, in the city of Brooklyn, and sister of said Edward C. Kimball, late of the county of Kings, State of New York, deceased, do hereby renounce all right to letters of administration on the goods, chattels and credits which were of said deceased.

Dated the 10th day of November, 1896.

HARRIET I. JAMES.

STATE OF NEW YORK, } ss:  
County of Kings, }

On this tenth day of November, in the year 1896, before me personally came Harriet I. James, known to me to be the person described in, and who executed the foregoing renunciation, and acknowledged to me that she executed the same.

EDWARD J. BERGEN,  
Notary Public.

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At a surrogate's court held in and for the county of Kings, at the surrogate's court-room, in the hall of records, in the city of Brooklyn, on the tenth day of November, in the year one thousand eight hundred and ninety-six.

Present: Hon. George B. Abbott, surrogate.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased.

*Decree Granting Administration.*

On reading and filing the verified petition of Harriet A. Kimball praying for a decree awarding letters of administration of the goods, chattels and credits which were of said deceased to her and to John S. James, of No. 6 Pierrepont street, Brooklyn, and Harriet I. James, the only other person appearing to have a right to letters of administration of the said goods, chattels and credits, having renounced such right, and on reading and filing the bond executed by said administratrix and administrator with competent sureties, conditioned faithfully to execute the trusts reposed in her and him as such administratrix and administrator, and to obey all orders of the surrogate of the county of Kings, touching the administration committed to her and him, and this court being satisfied that said Harriet A. Kimball and John S. James are in all respects competent to act as

such administratrix and administrator, does hereby order and decree that letters of administration of the goods, chattels and credits which were of said deceased be awarded to the said petitioner and to said John S. James.

GEO. B. ABBOTT, *Surrogate*.

*Surrogate's Court, Kings County.*

In the Matter of the Application for Letters of Administration on the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Answer of Respondents.*

The answer of Harriet A. Kimball, John S. James and Harriet I. James, by Arnold & Greene, their attorneys to the petition of Maude E. Kimball, the petitioner herein, respectfully shows to the court:

They deny, on information and belief, that the said petitioner is the widow of said Edward C. Kimball, deceased.

They admit that said Edward C. Kimball, deceased, departed this life at the city of Brooklyn on the 9th day of November, 1896, and was at the time of his death and immediately previous thereto a resident of the county of Kings and State of New York.

They admit that said Edward C. Kimball died a natural death, without leaving any last will and testament.

21 They admit that said Edward C. Kimball, deceased, was at the time of his death the owner of certain personal property, the value of which does not exceed the sum of \$10,000, and that he was seized at the time of his death of an undivided interest in certain real estate situated in the city of Brooklyn, the value of which is unknown to them, which real estate is subject to the dower interest of said Harriet A. Kimball, the mother of said deceased.

They admit that the next of kin of said Edward C. Kimball, deceased, are Harriet A. Kimball, the mother of said deceased, and said Harriet I. James, the sister of said deceased, both of whom reside at No. 6 Pierrepont street in the city of Brooklyn. They also admit that said deceased left him surviving no father, child, adopted child, child of deceased child, brother or sister, other than the said Harriett I. James, and no niece or nephew, the child of any deceased brother or sister.

They deny, on information and belief, that the statements in the petition made by said Harriet A. Kimball and John S. James for letters of administration of the estate of Edward C. Kimball, deceased, to the effect that the said Edward C. Kimball was unmarried at the time of his death and left him surviving no widow, are false and untrue, or that said Harriet A. Kimball well knew that the same were false and untrue at the time she made and verified such petition for letters of administration.

They admit that the said Edward C. Kimball, deceased, and the said petitioner went through a ceremony of marriage in the said city of Brooklyn on the 29th day of June, 1885, and they admit that

said Edward C. Kimball and the petitioner lived together thereafter at various places, but they allege that before the death of said Edward C. Kimball he separated from the petitioner, and was not living with her at the time of his death.

They further allege, on information and belief, that on the 12th day of May, 1885, the petitioner and one James L. Semon intermarried in the city of New York, according to the laws of the

22 State of New York; that thereafter and in the month of September, 1890, the said petitioner commenced an action in the district court, fifth judicial district of the State of North Dakota, county of Barnes, against said James L. Semon for a divorce; that the said James L. Semon was, when said action for a divorce was commenced, and ever since has been, a resident of the State of New York; that an order for the service of said summons by publication on said James L. Semon was made in said action by Hon. Roderick Rose, judge of said court, on the 30th day of September, 1890; that the summons in said action was not served upon said James L. Semon personally within the State of North Dakota, but was served upon him by leaving a copy thereof with him in the city of New York on the 15th day of October, 1890; that said James L. Semon did not appear in said action, and did not answer or demur to the complaint, and that such proceedings were thereafter had in said action on the part of the plaintiff that on the 26th day of January, 1891, the said court made a decree whereby it recited the service of the summons and complaint on said Semon in the State of New York, that he did not appear in said action or serve any answer or demurrer therein, and thereupon upon his default it was ordered, adjudged and decreed that the bonds of matrimony entered into between said petitioner and the said James L. Semon be dissolved, and the said parties and each of them freed and absolutely released from the bonds of matrimony and all the obligations thereof; that by reason of the facts that the said James L. Semon was at the time of the pendency of said action a resident of the State of New York; that he did not appear in said action or answer or demur to the complaint therein, and was not served with the summons in said action in the State of North Dakota, the said district court of North Dakota did not acquire jurisdiction of said James L. Semon in said action, and the said decree of divorce was and is absolutely null and void in the State of New York, and the said petitioner at the

23 time of her alleged marriage to the said Edward C. Kimball was, according to the laws of the State of New York, the wife of said James L. Semon, and could not lawfully enter into a contract of marriage with the said Edward C. Kimball, and the said alleged contract of marriage between them was absolutely null and void, and of no effect.

They further allege, on information and belief, that on the death of the said Edward C. Kimball all the property left by him in said State of New York passed, under the laws of that State, to the said Harriet A. Kimball, his mother, and the said Harriet I. James, his sister, as his only next of kin and heirs-at-law; that said Harriet A. Kimball, his mother, was entitled to apply for and receive letters of



administration, and that the said petitioner has no interest whatever in the real or personal estate left by said Kimball, as his widow or otherwise, and has no right to letters of administration upon his estate.

Hereto annexed is a copy of the judgment-roll in the said action of divorce brought in the said disrict court, fifth judicial district of the State of North Dakota, county of Barnes, by said petitioner against James L. Semon for a divorce as aforesaid.

Wherefore the said Harriet A. Kimball, John S. James and Harriet I. James pray that said petition be dismissed with costs.

Dated January 4th, 1897.

ARNOLD & GREENE,

*Attorneys for said Harriet A. Kimball, John S. James,  
and Harriet I. James, 3 Broad Street, New York, N. Y.*

COUNTY OF KINGS, ss:

Harriet A. Kimball, John S. James and Harriet I. James, being severally duly sworn, deposes and says, each for himself and  
24 herself, as follows: I have read the foregoing answer, and the same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

HARRIET A. KIMBALL.

JOHN S. JAMES.

HARRIET I. JAMES.

Sworn to before me this 4th day of January, 1897.

FRANCIS H. LUDLOW,

*Notary Public, Kings County, New York.*

EXHIBIT A.

STATE OF NORTH DAKOTA, }  
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }

vs.

JAMES L. SEMON, Defendant. }

*Decree for Plaintiff of Divorce "a Vinculo Matrimonii."*

This cause being brought by the above-named plaintiff, Maude E. Semon, to obtain a divorce "*a vinculo matrimonii*" from the above-named defendant, James L. Semon, on the ground of willful desertion and neglect; and it appearing to the court from the pleadings and papers on file in said cause that the summons therein has been duly served on said defendant by an order heretofore made by and from this court for the publication of said summons, and then and thereafter, as an equivalent to such publication as by statute in such

case made and provided, personal service was secured on said defendant in the State of New York; and that the defendant failed to answer, demur, or to make any appearance whatever, as by

25 the summons and the law required in such case, but instead thereof made default; that upon such default and upon the application of the plaintiff the court on the 3rd day of January, 1891, duly referred this cause, by an order to John Anderson, a notary public within and for the county of Barnes and State of North Dakota, of Valley City of said county and State, as referee, to take the evidence in the above-entitled action material to the allegations of said complaint, in the form of written questions and answers, and report the same to this court; and the said referee having taken the testimony by written questions and answers, and reported the same to the court, and in all things obeyed the order of the court; and an application having been duly made to this court, representing that Mrs. Sarah C. McKee, William McKee, Sophia M. Drake and Mrs. C. Baker, all residing in the county of Kings and State of New York, were material witnesses on the part of the plaintiff, in said cause, and that the personal attendance of said witnesses could not be procured at the trial of said action, the court duly appointed J. George Flammer, a notary public in and for the county of New York and State of New York, of said city and State, sole commissioner to take the testimony of said witnesses upon the interrogatories attached to his said commission of appointment, and none others, and to return said testimony when duly signed and certified, together with said commission and the papers thereto annexed, to the clerk of this court at Valley City, North Dakota, and the said commissioner having taken the testimony of the said witnesses as required by said commission, and reported the same to the clerk of this court, and in all things obeyed the order of the court; from which it appears that all the material allegations of the complaint aforesaid are proven by testimony free from all legal exceptions, as to the competency, admissibility and sufficiency thereof; that said matter so alleged and proven in behalf of the plaintiff is sufficient to entitle her to the relief prayed for in her complaint; that the plaintiff was a resident of Barnes county and State of North

Dakota at the commencement of this action, and had been

26 for more than ninety days next preceding; that for more than one year immediately and next preceding the commencement of this action the said defendant had wilfully and without cause deserted said plaintiff; and also since and during the time of his said desertion, had wilfully and without cause wholly neglected to provide said plaintiff and her two children born as the issue of the marriage with defendant, with the common necessities of life, and while plaintiff was a resident of this county and State aforesaid said defendant continuously so deserted and neglected to provide for said plaintiff and her said two children and still continues to do so; that said plaintiff and defendant intermarried on the 12th day of May, 1885, and that the issue of said marriage is Edna Kate Semon, born on the 8th day of June, 1886, and Randolph



Alexander Semon, born on the 6th day of August, 1887, and that the same are now living.

Now, therefore, on motion of Winterer & Winterer, counsel for plaintiff,

It is ordered, adjudged and decreed by the court that the bonds of matrimony heretofore entered into between the said plaintiff, Maude E. Semon, and the said defendant James L. Semon, on the 12th day of May, 1885, be hereby and are dissolved, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof; that the custody, care and education of the said children, the issue of the said marriage, be hereby and is awarded to the plaintiff; of which all persons interested are to take notice and govern themselves accordingly.

Dated at the city of Jamestown, county of Stutsman and State of North Dakota this 26th day of January, 1891.

RODERICK ROSE, *Judge.*

Attest: H. O. STERL, *Clerk,*  
By M. G. CUSHING, *Deputy.*

27 STATE OF NORTH DAKOTA, }  
County of Barnes, } ss:

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 29th day of January, 1891.

H. O. STERL,  
*Clerk of said Court,*  
By M. G. CUSHING, *Deputy.*

EXHIBIT B.

*Summons.*

STATE OF NORTH DAKOTA, }  
County of Barnes. }

In District Court, Fifth Judicial District.

MAUD E. SEMON, Plaintiff, }  
vs. }  
JAMES L. SEMON, Defendant. }

The State of North Dakota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which was filed in the office of the clerk of the district court of the fifth judicial district, in and for the county of Barnes and State of North Dakota, on the 25th day of September, 1890, a copy of which is herewith served on you, and to serve a copy of your answer to the said complaint on the subscribers at their office in the city of Valley City, in the

county and State aforesaid, within thirty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer to the complaint above mentioned as hereby required within the time aforesaid, the plaintiff in this action  
 28 will apply to the court for the relief demanded in the complaint.

WINTERER & WINTERER,  
*Attorneys for Plaintiff, Valley City, North Dakota.*

Dated at Valley City, North Dakota, this 23 day of Sept., 1890.

STATE OF NORTH DAKOTA, } ss:  
*County of Barnes,*

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 25th day of Sept., 1890.

A. J. HENRY,  
 By M. G. CUSHING, *Deputy.*

"EXHIBIT C."

STATE OF NORTH DAKOTA, } ss:  
*County of Barnes,*

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
*vs.*  
 JAMES L. SEMON, Defendant. }

*Sheriff's Return.*

I hereby certify that the within summons came to my hands on the 25th day of Sept., 1890, and that I made diligent search to find the within-named defendant in the said county of Barnes, but failed to find him, and I am informed and believe that the said de-  
 29 fendant is now a resident of New York, of the State of New York.

JOHN SIMONS,  
*Sheriff of Barnes County, N. D.,*  
 By SAMUEL BURT,  
*Deputy Sheriff.*

Dated at Valley City, North Dakota, this 25th day of September, 1890.

Sheriff's fees, \$—.

STATE OF NORTH DAKOTA, } ss:  
*County of Barnes,*

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 24th day of Jan'y, 1891.

H. O. STERL,  
*Clerk of said Court,*  
 By M. G. CUSHING, *Deputy.*

## EXHIBIT D.

STATE OF NORTH DAKOTA, }  
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
vs. }  
JAMES L. SEMON, Defendant. }

*Complaint.*

The plaintiff in the above-entitled action complains of the defendant and alleges:

I.

That the plaintiff and the above-named defendant James  
30 L. Semon, intermarried in the city of New York and State  
of New York according to the laws of said State, to wit on  
the 12th day of May, 1885, and ever since have been and now are  
husband and wife.

II.

That the plaintiff is now and has been a resident of the State of  
North Dakota, for the period of over ninety days immediately pre-  
ceding the commencement of this action, to wit: since the seventh  
day of June, 1890.

III.

That the issue of the said marriage of the plaintiff and defendant  
is two children, to wit: Edna Kate Semon, born on the 8th day of  
June, 1886, and Randolph Alexander Semon, born on the 6th day  
of August, 1887, and that the said children are now living.

IV.

That the said defendant, disregarding the solemnity of the mar-  
riage vow, wilfully and without cause deserted and abandoned said  
plaintiff more than one year previous to the commencement of this  
action, to wit: on the tenth day of September, 1889, and ever since  
has and still continues so to wilfully and without cause desert and  
abandon said plaintiff, and to live separate and apart from her,  
without any sufficient cause or reason, and against her will and  
without her consent.

And for a second and further cause of action the plaintiff alleges:

I.

That the said defendant has ever since his marriage with plain-  
tiff, to wit: since the 12th day of May, 1885, and as well before his  
desertion of plaintiff on the time aforesaid, to wit: on the 10th day  
of September, 1889, as thereafter, wilfully and without cause  
31 neglected to provide for the plaintiff the common necessities  
of life, having the ability so to do, and still continues so to

wilfully and without cause neglect to provide said plaintiff with the common necessities of life, and has compelled the said plaintiff to live on the proceeds of her own labor and on the charity of friends.

And for a further and third cause of action the plaintiff alleges :

I.

That the said defendant, since the time of his intermarriage with said plaintiff and during the time of his cohabitation with her, was, and as she believes, is still strongly addicted to the use of intoxicating liquor, the peace and happiness of said plaintiff having often been disturbed and destroyed by the intoxication of said defendant.

II.

That in accordance with the provisions of sections 2564 and 2583, of the Compiled Laws of 1887 of the Territory of Dakota, now State of North Dakota, said defendant is not a fit custodian of the issue of said marriage, nor competent to have the same in his charge or under his care.

Wherefore the plaintiff prays the court for judgment:

First. That the bonds of matrimony between herself and the defendant be dissolved.

Second. That the custody, care and education of the said children, resulting from the said marriage, to wit, Edna Kate Semon and Randolph Alexander Semon, be awarded to the plaintiff.

WINTERER & WINTERER,  
*Attorneys for Plaintiff.*

32     STATE OF NORTH DAKOTA, } ss :  
          County of Barnes,

Maude E. Semon, being first duly sworn, on her oath deposes and says :

That she is the plaintiff in the above-entitled action ; that she has read the above and foregoing complaint and knows the contents thereof ; and that the same is true of her own knowledge, except as to those matters stated therein on information and belief, and as to those matters she believes it to be true.

MAUDE E. SEMON.

Subscribed and sworn to before me this 23rd day of Sept. in the year of our Lord eighteen hundred and ninety.

[SEAL.]

GEORGE K. ANDRUS,  
*Notary Public, Barnes County, State of North Dakota.*

STATE OF NORTH DAKOTA, } ss :  
          County of Barnes,

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 25th day of Sept., 1890.

A. J. HENRY,  
By M. G. CUSHING, Deputy.

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## EXHIBIT E.

STATE OF NORTH DAKOTA, } ss:  
     County of Barnes,

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
                                   vs.  
     JAMES L. SEMON, Defendant. }

COUNTY OF BARNES, ss.:

Edward Winterer, being duly sworn, on oath, says, he is one of the attorneys for the plaintiff in this action; that the said defendant, James L. Semon, cannot after due diligence be found in this State; and that a summons was duly issued against said defendant and placed in the hands of the sheriff of said county for service, but was returned by said sheriff with his endorsement thereon that said defendant could not be found, which summons so endorsed is hereto annexed. That said affiant made diligent and thorough inquiries of those persons who are in the best position to know the residence and domicile of said defendant, to ascertain such residence and domicile, and was informed that defendant is not a resident of this State but resides and is now domiciled in the city of New York in the State of New York, and that said inquiries were made personally and by letter.

That a cause of action exists against the said defendant in favor of said plaintiff, as will appear by the complaint of said plaintiff, a copy of which is hereto annexed.

That the affiant is informed and believes that the said defendant, James L. Semon, resides at New York, in the State of New York, and that he is not a resident of this State, but resides in the city and State aforesaid, viz., city of New York and State of New York.

That the subject of this action is for a divorce, as in sub.  
 34 5 of section 4900 of the Compiled Laws of the Territory of  
     Dakota, now State of North Dakota, for 1887.

EDWARD WINTERER.

Subscribed and sworn to before me this 23rd day of September,  
 A. D. 1890.

[SEAL.]

GEORGE K. ANDRUS,  
 Notary Public, Barnes County, N. D.

STATE OF NORTH DAKOTA, } ss:  
     County of Barnes,

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county  
 of Barnes, North Dakota, this — day of —, 18—.

\_\_\_\_\_  
 Clerk of said Court.

## EXHIBIT F.

STATE OF NORTH DAKOTA, } ss :  
     County of Barnes, }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
                                   vs. }  
 JAMES L. SEMON, Defendant. }

It satisfactorily appearing to the Hon. Roderick Rose judge of this court by the annexed affidavit of Edward Winterer that the defendant James L. Semon cannot, after due diligence, be found within this State and in a like manner appearing that a cause of action exists against the said defendant in favor of said plaintiff, Maude E. Semon, for a divorce from the bonds of matrimony between herself and said defendant as set forth in her complaint, a copy of which is hereto annexed, and that the subject of said action is included under and governed by subdivision five (5) of sec. 4900 of the Compiled Laws of the Territory of Dakota, now State of North Dakota, for 1887.

And it further appearing that the place of residence of the said defendant James L. Semon is at New York in the State of New York.

On motion of Winterer & Winterer attorneys for the said plaintiff, ordered that service be made upon said defendant by the publication of a summons in the form of the copy of same hereto annexed, in the Farmers' Alliance a newspaper printed and published in Valley City, Barnes county, N. Dak. the same being most likely to give notice to said defendant, once a week for at least six successive weeks.

And it is further ordered and directed that a copy of the summons and complaint be forthwith deposited in the post-office, directed to the said defendant, the person to be served, at New York, in the State of New York, his place of residence, and postage paid.

Dated September 30th, 1890.

RODERICK ROSE, *Judge.*

Attest: H. O. STERL, *Clerk.*

G. M. CUSHING, *Deputy.*

[Seal of District Court, Barnes County, State of North Dakota.]

STATE OF NORTH DAKOTA, }  
*County of Barnes.* }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
*vs.*  
 JAMES L. SEMON, Defendant. }

CITY AND COUNTY OF NEW YORK, ss:

Francis W. Judge, Jr., being duly sworn, says that he is over the age of twenty-one years, and is a special deputy sheriff within and for the county of New York. That on the 15th day of October, 1890, at No. 803 Ninth avenue in the city of New York, he served the annexed summons together with a copy of the annexed complaint upon the defendant James L. Semon therein named by delivering a copy of said summons and the said copy complaint to the said James L. Semon personally and leaving the same with him, and at the same time showing him the original summons and complaint herein.

Deponent further says that he knew the said James L. Semon served as aforesaid to be the same person mentioned and described in the said summons and complaint as the defendant in this action.

FRANCIS W. JUDGE, JR.

Sworn to before me this 15th day of October, 1890.

JAMES FORREST,  
*Notary Public, N. Y. Co.*

STATE OF NORTH DAKOTA, } ss:  
*County of Barnes,* }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 24th day of January, 1891.

H. O. STERL,  
*Clerk of said Court,*  
 By M. G. CUSHING, *Deputy.*

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## EXHIBIT H.

STATE OF NORTH DAKOTA, }  
 County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
 vs. }  
 JAMES L. SEMON, Defendant. }

*Affidavit of No Answer.*

Edward Winterer being first duly sworn according to law on his oath deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that said defendant, James L. Semon, could not after due diligence be found in this State; that a summons was duly issued against said defendant and placed in the hands of the sheriff of said county of Barnes for service but was returned by said sheriff of said county of Barnes with his endorsement thereon that said defendant could not be found in said county, and it appearing that said defendant was known to be a resident of the State of New York, an order was issued by the court of the fifth judicial district of this State on the 30th day of September, 1890, that said defendant be served by the publication of the summons as provided by law and that after such order was issued and in lieu of and as an equivalent to such publication as by statute in this State made and provided, due personal service was made on said defendant on the 15th day of October, 1890, in the city of New York, State of New York, and that now more than thirty days have elapsed since said personal service was made and obtained on said defendant as aforesaid, and that no answer or demurrer to the complaint of the plaintiff in said action has been received by the plaintiff or her attorneys in said cause, and that said defendant

38 has not made, served or filed an appearance in any manner therein.

EDWARD WINTERER.

Subscribed and sworn to before me this 31st day of December, 1890.

[SEAL.]

JOHN ANDERSON,  
 Notary Public, Barnes Co., N. D.

STATE OF NORTH DAKOTA, }  
 County of Barnes, } ss: .

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 24th day of January, 1891.

H. O. STERL,  
 By M. G. CUSHING, Deputy.



## EXHIBIT I.

STATE OF NORTH DAKOTA, } ss:  
     County of Barnes, }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
                                   vs. }  
     JAMES L. SEMON, Defendant. }

*Affidavit for Commission to Take Testimony.*

Edward Winterer being first duly sworn, on his oath deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action, which has been brought for a divorce from the bonds of matrimony. That the summons and a copy of the complaint in this action have been duly served on the defendant 39 as provided by statute in this State on the 15th day of October, 1890, in the city of New York, and State of New York, and that now over thirty days have elapsed since such personal service was made, and said defendant has failed to serve any answer, or demurrer, or copy of either to the complaint in this action on said plaintiff or her attorneys in said cause or to make any appearance whatever in said action; that the said plaintiff, Maude E. Semon, has fully and fairly stated the case in this cause to said deponent and fully and fairly disclosed to him the facts which she expects to prove and that Mrs. Sarah C. McKee, William McKee, Sophia M. Drake, and Mrs. C. Baker are all material and necessary witnesses for the said plaintiff on the trial of this action and without the aid and benefit of the testimony of the said witnesses the plaintiff cannot safely proceed to trial; that the said witnesses reside in the city of Brooklyn, Kings county and State of New York, that the same are out of this State and will continue to be absent therefrom when their testimony is required. And deponent further states that from his knowledge of the facts in said case he verily believes that the said plaintiff has a good and meritorious cause of action.

EDWARD WINTERER.

Subscribed and sworn to this 31st day of Dec., 1890.

JOHN ANDERSON,  
     Notary Public, Barnes Co., N. D.

[SEAL.]

STATE OF NORTH DAKOTA, } ss:  
     County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 24th day of January, 1891.

H. O. STERL,  
     Clerk of said Court.  
     M. G. CUSHING, Deputy.

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## EXHIBIT J.

STATE OF NORTH DAKOTA, }  
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
vs. }  
JAMES L. SEMON, Defendant. }

*Order of Reference.*

Upon examination of the complaint of the plaintiff duly verified and filed in the above-entitled action, and it appearing therefrom that a cause of action exists against the defendant therein named and in favor of said plaintiff, and that the same is within the jurisdiction of this court to determine, and

It further appearing from the summons on file and presented to me, with the official endorsement of the sheriff of said Barnes county duly made thereon, that after diligent search he could not find said defendant in said county and from the affidavit of Edward Winterer, one of the attorneys for said plaintiff, that said defendant is not a resident of this State, and that an order was issued by this court on the 30th day of September, 1890, that due service be made on said defendant by publication of the summons as provided by law, and that in lieu of and as an equivalent to such publication as provided by section 4900, sub. 5, of the Compiled Laws of this State, personal service was duly made on the said defendant in the city of New York, State of New York, on the 15th day of October, 1890, as appears by the affidavit of Francis W. Judge, Jr., hereto attached, and

It further appearing by the affidavit of Edward Winterer, one of the attorneys for said plaintiff, that no answer or demurrer to said complaint has been served upon or received by plaintiff or her attorneys in this action, and that said defendant has not made, served or filed an appearance in any manner therein, and

It further appearing that this action is brought for the purpose of obtaining a divorce *a vinculo matrimonii*, and that the plaintiff having applied to this court for the relief demanded in her complaint and that the nature of the action is such that the court has discretionary power to refer the same:

Now, therefore, on motion of Winterer & Winterer, attorneys for plaintiff, no person appearing to oppose the same,

It is ordered that the said cause be and the same is hereby referred to John Anderson, a notary public within and for said county and State, of Valley City, Barnes county, North Dakota, and he is hereby expressly appointed as referee and authorized with full and plenary powers to take the evidence in the above-entitled action material to the allegations of said complaint, in the form of written questions and answers, and to do all such other acts as are necessary

to fully complete and carry into effect this order, and that said referee is required to report all the evidence taken by him in relation thereto and to report the same to this court within twenty days after the evidence is closed.

By the court.

RODERICK ROSE, *Judge.*

Done at Valley City, N. Dakota, this 3rd day of January, 1891.

Attest: H. O. STERL, *Clerk,*

By M. G. CUSHING, *Deputy.*

[Seal of said Court.]

STATE OF N. D., } ss:  
Co. Barnes, }

Fifth Judicial District Court.

Filed in the offices of the clerk of the district court for the county of Barnes, North Dakota, this 24th day of January, 1891.

H. O. STERL,

*Clerk of said Court,*

By M. G. CUSHING, *Deputy.*

42 STATE OF NORTH DAKOTA, }  
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
vs. }

JAMES L. SEMON, Defendant. }

I, H. O. Sterl, clerk of the district court of the fifth judicial district in and for the county of Barnes, State of North Dakota, do hereby certify that I have compared the annexed instrument, to wit, Exhibit A pages 1 and 2 Exhibit B, C and D pages 1 and 2, Exhibit E, F, G, H, I, and J, being respectively the decree for the plaintiff of divorce "*a vinculo matrimonii*" with filing mark of the clerk thereon, summons with filing mark thereon, sheriff's return with filing mark thereon, complaint, and verification of complaint, with filing mark thereon, affidavit of Edward Winterer, one of the attorneys for the plaintiff, signed and sworn to on the 23rd day of September, A. D., 1890, before George K. Andrus, notary public, with filing mark thereon, order for the publication of the summons signed by Roderick Rose, judge, on the 30th day of September, 1890, proof of service of the summons and complaint, on the defendant, James L. Semon, which proof was executed on the 15th day of October, 1890, before James Forrest, notary public, New York, with filing mark thereon, affidavit for commission to take testimony, with filing mark thereon, and order of reference with filing mark thereon, with the original files and records, constituting the judgment-roll in the above-entitled action, which judgment-roll is now on file and of record in my office and that said papers, and

each of them are true and correct copies of said originals and the whole thereof.

I furthermore certify that said papers are true and correct copies of the entire judgment-roll on file in my office in said action, except the testimony of the witnesses therein, and the report of the referee appointed to take testimony, and the oath of said referee.

43 In testimony whereof, I have hereunto subscribed my name and affixed the seal of this court thereto at my office in the court-house, in the city of Valley City, in the county of Barnes, State of North Dakota, that being the office of the clerk of the said district court in and for the said county of Barnes and State of North Dakota.

H. O. STERL,

[SEAL OF SAID COURT.] *Clerk of the District Court in and  
for the County of Barnes and  
State of North Dakota.*

EXHIBIT A 1.

STATE OF NORTH DAKOTA, } ss:  
*County of Stutsman,*

I, Roderick Rose, judge of the district court within and for the fifth judicial district of the State of North Dakota, including the counties of Barnes and Stutsman, in said judicial district, do hereby certify that I have examined the annexed certificate and attestation of H. O. Sterl, clerk of the said district court within and for the said county of Barnes; that the said H. O. Sterl is the clerk of said court within and for the said county of Barnes, and the proper person to make said certificate and attestation; that I am well acquainted with and know that the handwriting of the said H. O. Sterl and the signature attached to the said certificate purporting to be the signature of the said H. O. Sterl, and know that it is his genuine signature, and I further certify that said certificate and attestation is made and executed in due form and in compliance with law.

Dated this 10th day of December, 1896.

RODERICK ROSE,

*Judge of the District Court of the Fifth Judicial  
District of the State of North Dakota.*

44 STATE OF NORTH DAKOTA, } ss:  
*County of Barnes,*

In District Court, Fifth Judicial District.

I, H. O. Sterl, clerk of the district court within and for the said county of Barnes, in the fifth judicial district of said State of North Dakota, do hereby certify that I have examined the certificate hereto attached purporting to be made by Roderick Rose, judge of the fifth judicial district of the State of North Dakota, and presiding judge of the district court within and for the county of Barnes in the State of North Dakota; that the said Roderick Rose is the judge of the fifth judicial district and is the presiding judge of the

district court within and for the said county of Barnes and is the duly elected, qualified and acting judge of the said judicial district and of said district court within and for said Barnes county; that I am well acquainted with the signature of the said Roderick Rose and know that the signature attached to said certificate purporting to be the signature of the said Roderick Rose is in his handwriting and is his genuine signature.

Witness my hand and seal this 10th day of December, 1896.

H. O. STERL,

[SEAL OF SAID COURT.]

*Clerk of Court.*

I, C. M. Dahl, by William O. De Puy, deputy secretary of state in and for the State of North Dakota, do hereby certify that the district court of the fifth judicial district, including the county of Barnes, in the State of North Dakota, is organized and existing under, by virtue of and pursuant to the constitution and laws of the State of North Dakota; that said court is a court of general jurisdiction; that the present judge of said court is the Hon. Roderick Rose, the identical person who has signed the annexed  
45 certificate marked Exhibit "A 1." That I am acquainted with the signature of the said judge and know that the signature attached to said certificate marked Exhibit "A 1," purporting to be his signature is in his handwriting and is genuine.

Dated December 17th, A. D. 1896.

C. M. DAHL,

*Secretary of State,*

By WILLIAM O. DE PUY,

*Deputy Sec. of State.*

[SEAL.]

### Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

### *Reply of Maude E. Kimball.*

Your petitioner, Maude E. Kimball, replying to the answer of Harriet A. Kimball, John S. James and Harriet I. James in the above matter, verified January 4th, 1897, respectfully shows:

First. Your petitioner denies that she and Edward C. Kimball were ever separated and were not living together at the time of his death, except that said Edward C. Kimball left the city of Brooklyn and went to Easton, Pennsylvania, to engage in business, and your  
46 petitioner was compelled to return to her mother's home and live with her owing to the inability of said Edward C. Kimball to support your petitioner, as alleged in the petition herein.

Second. Your petitioner denies that James L. Semon mentioned in said answer did not appear in the action for divorce referred to in

said answer, and that said Semon did not answer the complaint therein.

Third. Your petitioner further denies that the district court, fifth judicial district of the State of North Dakota, county of Barnes, did not acquire jurisdiction of said James L. Semon in said action, and that the decree of divorce in said action was and is absolutely null and void in the State of New York.

Fourth. Your petitioner further denies that, at the time of her marriage to said Edward C. Kimball, she was the wife of said James L. Semon according to the laws of the State of New York; and she also denies that she could not lawfully enter into a marriage with said Edward C. Kimball; and she denies that the marriage between them was absolutely null and void and of no effect.

Fifth. Your petitioner further denies that, on the death of said Edward C. Kimball, all the property left by him in the State of New York passed, under the laws of that State, to Harriet A. Kimball, his mother, and the said Harriet I. James, his sister; and also denies that said Harriet A. Kimball was entitled to apply for and receive letters of administration; and also denies that this petitioner has no interest in the real or personal estate left by said Edward C. Kimball, as his widow or otherwise, and has no right to letters of administration upon his estate as alleged in said answer.

Sixth. Your petitioner further denies that the paper annexed to said answer is a copy of the judgment-roll in said action for divorce.

47 Seventh. And for further reply your petitioner alleges that the papers hereto annexed and marked, respectively, "Exhibit A" and "Exhibit B" are exemplified copies of parts of the judgment-roll in said action for divorce, and that the papers annexed to the said answer, and referred to in the next preceding paragraph hereof, together with said "Exhibit A" and said "Exhibit B," comprise the complete judgment-roll in said action for divorce. That said Harriet A. Kimball, John S. James and Harriet I. James well knew prior to verifying their said answer, that said alleged judgment-roll set forth in their said answer was incomplete, in that it omitted the parts hereto annexed and marked respectively "Exhibit A" and "Exhibit B," as aforesaid.

Eighth. Your petitioner further alleges that her former husband, James L. Semon, did appear and answer in said action for divorce, and did submit himself to the jurisdiction of the court therein; but by inadvertence and mistake said appearance and answer were not recited in the decree of divorce in said action, dated the 26th day of January, 1891; that thereafter, to wit, on the 16th day of December, 1896, upon the petition of said James L. Semon, said decree was duly amended in the form and manner shown by said papers hereto annexed and marked respectively "Exhibit A" and "Exhibit B," as aforesaid.

Ninth. Your petitioner further alleges that on more than one occasion prior to her said marriage with Edward C. Kimball she delivered to him, at his request, a copy of the decree of divorce aforesaid, dated the 26th day of January, 1891, and filed January 29th,

1891, duly certified by the clerk of the said district court and under the seal of said court, and that said Edward C. Kimball read the same and retained it in his possession several days; and that he, said Edward C. Kimball, well knew that before, and at the time of,

and after our said marriage to each other, the said James L. Semon was living; and upon information and belief, that prior to your petitioner's said marriage to said Edward C. Kimball, said Harriet A. Kimball, John S. James and Harriet I. James also well knew of said divorce proceedings and saw said certified copy of said decree of divorce, and knew the contents thereof, and also well knew that said James L. Semon was alive during the whole of the married life of your petitioner and said Edward C. Kimball.

Tenth. Your petitioner further alleges that the proceedings in said action for divorce were regular and sufficient, and that the said decree of divorce was duly given and made, and was and is a valid, binding and conclusive adjudication and judgment under the laws of the State of North Dakota, in the State of North Dakota and in the State of New York, and in every other State in the United States. And your petitioner begs leave to present on the hearing of the above-entitled matter such portions of the laws of the State of North Dakota as she may be advised pertinent to the matters herein referred to.

Wherefore your petitioner prays for the relief demanded in her petition herein, verified on the 17th day of December, 1896.

Dated this 19th day of January, 1897.

MAUDE E. KIMBALL, *Petitioner.*

WALDEGRAVE HARLOCK,

*Attorney for Petitioner,*

*20 Nassau Street, New York City.*

STATE OF NEW YORK, }  
County of Kings, City of Brooklyn, } ss:

Maude E. Kimball, the above-named petitioner, being duly sworn, doth depose and say that she has read the foregoing reply subscribed by her, and that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

MAUDE E. KIMBALL.

Subscribed and sworn to before me this 12th day of January, 1897.

THOS. W. HARRIS,  
*Notary Public, Kings County.*



## EXHIBIT A.

STATE OF NORTH DAKOTA, } ss:  
     County of Barnes,

In District Court, Fifth Judicial District.

I, H. O. Sterl, clerk of the district court in and for said county, do hereby certify that I have compared the papers in writing, to which this certificate is attached, with the original petition of James L. Semon herein verified December 1st, 1896, and the letter, Exhibit "A," attached, and with the "order to show cause why leave should not be granted to amend decree," dated December 8th, 1896, and with the affidavit of Herman Winterer sworn to December 11th, 1896, and with the order of the court herein "granting leave to amend decree *nunc pro tunc*," dated December 16th, 1896, as the same appear of record and on file in my said office, at the court-house in said county, and that the same are true and correct copies of said originals, and the whole thereof.

In testimony whereof, I have hereunto set my hand  
 Seal of said      and affixed the seal of said court at Valley City, said  
 Court.      county and State, this 16th day of December, A. D.  
    1896.

H. O. STERL, Clerk.

50      STATE OF NORTH DAKOTA, } ss:  
             County of Barnes,

I, Roderick Rose, judge of the fifth judicial district of the State of North Dakota, do hereby certify that H. O. Sterl whose name is subscribed to the foregoing certificate of attestation, now is, and was, at the time of signing and sealing the same, clerk of the district court of Barnes county aforesaid (which county is in said fifth judicial district) and keeper of the records and seal thereof, duly elected and qualified to office; that full faith and credit are and of right ought to be given to all his official acts as such in all courts of record and elsewhere; and that his said attestation is in due form of law, and by the proper officer.

Given under my hand and seal this 16th day of December, A. D. 1896.

RODERICK ROSE, [SEAL.]  
    District Judge.

STATE OF NORTH DAKOTA, } ss:  
     County of Barnes,

I, H. O. Sterl, clerk of the district court, in and for said county, in the State aforesaid, do hereby certify that Roderick Rose, whose genuine signature is appended to the foregoing certificate, was, at the time of signing the same, judge of the district court of the fifth judicial district of the State of North Dakota (of which judicial district the said Barnes county forms a part), duly commissioned and qualified; that full faith and credit are and of right ought to be given to all his official acts as such, in all courts of record and elsewhere.



In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Valley City, in said county and State this 16th day of December, A. D. 1896.

H. O. STERL, *Clerk.*

51 STATE OF NORTH DAKOTA, } ss :  
County of Barnes,

In District Court, Fifth Judicial District.

At a regular term of said district court held at the county courthouse, in Valley City, N. D., on the — day of December, A. D. 1896.

MAUDE E. SEMON, Plaintiff, }  
vs.  
JAMES L. SEMON, Defendant. }

*Order Amending Decree Nunc pro Tunc.*

On reading and filing the petition of James L. Semon, verified the 1st day of December, 1896, and the affidavit of Herman Winterer, Esq., verified the 11th day of December, 1896, and proof of due notice of this motion to Winterer & Winterer, attorneys of record for plaintiff, and after hearing Frank J. Young, Esq., in support of said motion, and no one appearing in opposition thereto, and on motion of Young & Burke, attorneys for defendant,

It is ordered that said motion be, and the same is, hereby granted, and that the copy of defendant's letter dated October 23rd, 1890, directed to Herman Winterer, be filed herein as of the date of its receipt by said Winterer, and that the decree made herein dated January 26th, 1891, be amended *nunc pro tunc* as of the 26th day of January, 1891, by striking out therefrom the recitals setting forth "that the defendant failed to answer, demur or make any appearance whatever, as by the summons and the law required in such case, but instead thereof made default; that upon such default,"

and by inserting in lieu thereof the following words: "the defendant having appeared herein and answered and submitted himself to the jurisdiction of the court."

Dated this 16th day of December, A. D. 1896.

By the court:

RODERICK ROSE, *Judge.*

Attest: H. O. STERL, *Clerk.*

[Seal of said Court.]

(Endorsed.)

STATE OF NORTH DAKOTA, } ss :  
County of Barnes,

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16th day of Dec., 1896.

H. O. STERL,  
*Clerk of said Court.*

STATE OF NORTH DAKOTA, }  
County of Barnes, } ss

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
vs. }  
JAMES L. SEMON, Defendant. }

*Affidavit.*

STATE OF NORTH DAKOTA, }  
County of Barnes, } ss:

Herman Winterer, being first duly sworn, deposes and says that he is an attorney-at-law and has been in actual practice as such in the county of Barnes and State of North Dakota ever since the month of April, 1883; that subsequent to that time and prior 53 to October, 1890, Mr. Edward Winterer was associated with him, and the said affiant has since been practicing law at said place under the firm name of Winterer & Winterer, consisting of said parties above named; that prior to October 23rd, 1890, said firm brought an action for the above-named plaintiff and against the above-named defendant, for the purpose of procuring a divorce for said plaintiff; that on the 8th day of December, 1896, said firm were served with a copy of the petition and an order to show cause, made by the judge of the above-entitled court, on the 8th day of December, 1896, whereby said defendant petitioned the said court for leave to amend *nunc pro tunc* the decree of divorce granted to said plaintiff by the said court on the 26th day of January, 1891; that affiant has read said petition and also Exhibit "A" made a part thereof.

That Messrs. Young & Burke, attorneys for said defendant, upon said petition, have made request upon the affiant to procure the original of the letter marked Exhibit "A" of said petition, but affiant is unable to do so, for the reason that after he has made diligent search, he is unable to find the same; that the same is either lost or destroyed; whereupon said Young & Burke, as attorneys for said defendant, request affiant to make affidavit, stating whether or not he, affiant, ever received such a letter as the one above referred to as Exhibit "A."

That affiant pursuant to such request, and as a matter of fact, hereby states that the said original letter cannot be found, and alleges further that he did receive the original letter of which the said Exhibit "A" is a copy, and that the said copy marked Exhibit "A" as aforesaid is made a part of said petition, and is a true and correct copy of the original received by this affiant on or about Oct. 28th, 1890; that the said original letter was never filed with the records in the above-entitled cause, the reason for not filing the same, to the best of affiant's belief and remembrance, being this, to wit: Because the said letter was not in the form of a pleading 54 under the requirements of the statute of the State of North Dakota. Further affiant sayeth not.

HERMAN WINTERER.

Subscribed and sworn to before me this 11th day of December, 1896.

[SEAL.]

LOUISE WINTERER,  
*Notary Public, State of North Dakota.*

(Endorsed.)

STATE OF NORTH DAKOTA, }  
*County of Barnes,* } ss:

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16th day of Dec., 1896.

H. O. STERL,  
*Clerk of said Court.*

STATE OF NORTH DAKOTA, }  
*County of Barnes.* }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
vs. }  
JAMES L. SEMON, Defendant. }

NEW YORK, *December 1st, 1896.*

To Young & Burke, attorneys-at-law, Valley City, N. D.

I hereby authorize and request you to appear as my attorneys in the above-entitled matter for the purpose of having the decree herein amended according to the prayer of my petition sworn to December 1st, 1896; and to receive and acknowledge service of all papers herein on my behalf, and to do any act or thing, as  
55 my attorney-, that may be necessary and proper in this case and in my interest.

JAMES L. SEMON.

Subscribed and acknowledged before me this 1st day of December, 1896.

[L. s.] F. W. LONGFELLOW,  
*Notary Public, New York County, N. Y.*

STATE OF NEW YORK, }  
*City and County of New York,* } ss:

On this first day of December, 1896, before me, F. W. Longfellow, a notary public for the county of New York, personally appeared James L. Semon known to me to be the person who is described in and who executed the above instrument, and he acknowledged to me that he executed the same.

[SEAL.]

F. W. LONGFELLOW, ss.,  
*Notary Public, N. Y. Co.*

(Endorsed.)

STATE OF NORTH DAKOTA, } ss:  
 County of Barnes,

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16 day of Dec., 1896.

H. O. STERL,  
 Clerk of said Court.

56 STATE OF NORTH DAKOTA, } ss:  
 County of Barnes,

In District Court, Fifth Judicial District.

At a regular term of said district court held at the county court-house in Valley City, N. D., on the 8th day of December, 1896.

MAUDE E. SEMON, Plaintiff, }  
 vs.  
 JAMES L. SEMON, Defendant. }

*Order to Show Cause Why Decree Should Not Be Amended.*

On the annexed petition of James L. Semon, verified the 1st day of December, 1896, and on motion of Young & Burke, attorneys for defendant, let the plaintiff or her attorneys show cause before the court at the court-house at Valley City, N. D., on the 11th day of December, 1896, at 2 o'clock, p. m., why the alleged answer should not be filed *nunc pro tunc*, and why the decree filed herein should not be amended *nunc pro tunc* so as to show that defendant appeared in said action, as prayed for. Let a copy of this order and of the defendant's petition annexed hereto be served on plaintiff's attorneys of record forthwith.

Dated, December 8th, 1896.

RODERICK ROSE, *Judge.*

Due and personal service by receipt of a copy of above order and of a copy of the petition of defendant herein is hereby admitted this 8th day of December, 1896.

WINTERER & WINTERER.

(Endorsed.)

STATE OF NORTH DAKOTA, } ss:  
 County of Barnes,

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16 day of Dec., 1896.

H. O. STERL,  
 Clerk of said Court.

57 STATE OF NORTH DAKOTA, }  
     County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
                                   against  
 JAMES L. SEMON, Defendant. }

To the Honorable Roderick Rose, judge :

The petition of James L. Semon respectfully shows :

That your petitioner is the defendant above named.

That this cause or action was brought by Maude E. Semon, the above-named plaintiff, to obtain a divorce "*a vinculo matrimonii*" from your petitioner, and that a decree was made herein bearing date the 26th day of January, 1891, and filed in the office of the clerk of the district court for the county of Barnes, North Dakota, on the 29th day of January, 1891. That said decree adjudged "that the bonds of matrimony heretofore entered into between the said plaintiff, Maude E. Semon, and the said defendant, James L. Semon, on the 12th day of May, 1885, be hereby and are dissolved, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof."

That said decree recites, among other things, "that the defendant (meaning your petitioner) failed to answer, demur, or to make any appearance whatever, as by the summons and the law required in such case, but instead thereof made default."

That the summons and complaint in said cause or action were duly served personally upon your petitioner in the city, county and State of New York, on the 15th day of October, 1890; that said summons required your petitioner to answer the complaint in this action and to serve a copy of his answer upon Winterer & Winterer, attorneys for the plaintiff, within thirty days after the service of said summons upon your petitioner.

That your petitioner, desiring to appear in said action and to answer said complaint as required by said summons, did on the 23rd day of October, 1890, at the city of New York aforesaid, where  
 58 your petitioner then resided, prepare, make and sign his answer to the said complaint, and did subscribe and swear to the same on the 23rd day of October, 1890, before James T. Clark, a notary public in and for the city and county of New York, duly commissioned by law to take oaths and acknowledgments in the said city and county; and on the said 23rd day of October, 1890, your petitioner served by mail his said answer upon Winterer & Winterer, attorneys for plaintiff, by personally depositing in the post-office in the said city of New York his said answer, enclosed in a sealed envelope, with the postage prepaid, addressed to Winterer & Winterer, attorneys for the plaintiff, at Valley City, North Dakota. That a copy of said answer is hereto annexed marked "A."

That your petitioner prepared and sent said answer without the aid or advice and without consultation with any counselor or attorney at law, in order to avoid the expense thereof; and with the

intention to have the said answer presented to this court so as to inform the court of your petitioner's position and defense in this action, and to submit himself to the jurisdiction of the court herein, and to have his rights adjudicated by this court without incurring any expense in the matter. That your petitioner believed that said answer so subscribed and sworn to by him and sent to plaintiff's attorneys would be filed in court as part of the proceedings herein ; but your petitioner has learned within the last few days, for the first time, that the same was not filed, and your petitioner has never been aware until now of the recitals of his default in the decree as aforesaid, and has never been served with a copy of said decree.

That your petitioner is informed and believes that the plaintiff, Maude E. Semon, relying upon said decree, married one Edward C. Kimball on the 29th day of June, 1895 ; but your petitioner has not married since said decree was made, and being a resident and citizen of the State of New York at the time of the service on him of the summons as aforesaid, and ever since, your petitioner is now

59 advised by counsel that it would be impossible for him to marry again in view of the erroneous recital in the decree as aforesaid to the effect that your petitioner did not appear or answer in said action but made default therein, as the laws of the State of New York do not regard a decree of divorce against a non-resident defendant granted by default by the courts of another State as of any binding effect outside of the State in which it was granted, in cases where there is no appearance in the action by the non-resident defendant or no service of process on him within the State wherein the decree is granted.

That your petitioner desires that his said answer, or the copy thereof hereto annexed, be filed herein *nunc pro tunc* by leave of this court, and that said decree be amended *nunc pro tunc* so as to recite the appearance of your petitioner in order that said decree may conform to the facts as they existed at the time it was granted, and may show upon its face that your petitioner appeared and answered and submitted himself to the jurisdiction of this court in this action. Your petitioner desires thereby to make the decree of as binding effect in the State of New York where your petitioner resided when said action was commenced and ever since has resided, as said decree has in the State of North Dakota, and in order that your petitioner may not violate the laws of the State of New York in case of his remarriage at any time hereafter to any person other than the plaintiff during her lifetime.

Wherefore your petitioner prays this honorable court, in the furtherance of justice, that the said answer, or the copy thereof hereto annexed, be, by leave of this court filed herein *nunc pro tunc* as of the date of its service, as aforesaid, on the plaintiff's attorneys, Winterer & Winterer, and that said decree made herein and dated the 26th day of January, 1891, and filed in the office of the clerk of the district court for the county of Barnes, North Dakota, on the 29th day of January, 1891, be amended *nunc pro tunc* as of the 26th day of January, 1891, by striking out therefrom the recitals setting

60 forth "that the defendant failed to answer, demur, or to make any appearance whatever, as by the summons and the law required in such case, but instead thereof made default; that upon such default" and by inserting in lieu thereof the following words "the defendant having appeared herein and answered and submitted himself to the jurisdiction of the court;" and for such further and other relief as may be meet.

And your petitioner will ever pray.

Dated, December 1st, 1896.

JAMES L. SEMON, *Petitioner.*

STATE OF NEW YORK, }  
City and County of New York, } ss:

James L. Semon, being duly sworn, deposes and says that he is the defendant in the above-entitled action and the person mentioned in and who subscribed the foregoing petition; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JAMES L. SEMON.

Subscribed and sworn to before me this first day of December, 1896.

[L. S.] F. W. LONGFELLOW,  
Notary Public (55), New York County, N. Y.

STATE OF NEW YORK, }  
City and County of New York, } ss:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify, that F. W. Longfellow, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York,  
61 dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of the said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 1 day of Dec., 1896.

[SEAL.]

HENRY D. PURROY, *Clerk.*

(Endorsed:)

STATE OF NORTH DAKOTA, }  
County of Barnes, } ss:

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16 day of Dec., 1896.

H. O. STERL,  
Clerk of said Court.



"A."

NEW YORK, Oct. 23, '90.

Mr. Herman Winterer.

DEAR SIR: In reply to the contents of paper served on me Oct. 15, 1890, by your representative, relative to my wife and children, I would say that my — has sworn to matters untrue. For instance, this matter of desertion, this is surprising to me, as my wife personally ordered me from the house and stated that she never wished to see me again, this was the fore part of September, 1889. I did as I was ordered, having no alternative, as I was living under her mother's roof. Now is it at all likely that a domesticated  
 62 man (as my wife will tell you I was) would give up a good home, without good reasons for so doing? It was only a short time after I left the house, that they moved and took up another dwelling place, I never receiving any notification where I could see my children. I have meditated over this matter more than once, and have often wondered why it was done. It is now over a year ago, since I saw my children last.

In relation to my not providing for her I would say, that I have always given what I had, and very often more than I could afford. I am now carrying on the painting business which was left to me by my father who is now dead. When I came into possession of the business it was very much in debt. I have been trying ever since I took it to wipe out this burden, but as yet have not fully accomplished my aim and desire. There were times when I was not doing very much in my business, and consequently could not provide as promptly as I would like to. My wife swearing that I did not provide for her the common necessities of life simply tells an untruth.

As to my drinking habits, I will admit that I have indulged a little too much at times, but now have got bravely over that, having not tasted it in over a year. As the father of my children I was glad to hear of their existence, and hope in the near future of having the pleasure of seeing my own flesh and blood.

Very respectfully,

JAS. L. SEMON,  
803 9 Ave., N. Y. C.

CITY &amp; COUNTY OF NEW YORK, ss:

63 Jas. L. Semon being duly sworn deposes and says that he is the writer of the foregoing letter, that he knows the contents thereof, and that it is absolutely true in every particular.

JAS. L. SEMON. [L. s.]

Subscribed and sworn to before me this 23rd day of October, 1890.

[L. s.]

JAS. T. CLARK,  
Notary Public for Co. of N. Y.

(Endorsed :)

STATE OF NORTH DAKOTA, } ss:  
           County of Barnes,

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16 day of Dec., 1896.

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Very respectfully,

JAS. L. SEMON,  
 803 9 Ave., N. Y. C.

CITY AND COUNTY OF NEW YORK, ss:

Jas. L. Semon being duly sworn deposes and says that he is the writer of the foregoing letter, that he knows the contents thereof, and that it is absolutely true in every particular.

JAS. L. SEMON. [L. s.]

Subscribed and sworn to before me this 23rd day of October, 1890.

[L. S.]

JAS. T. CLARK,

Notary Public for Co. of N. Y.

65

(Endorsed.)

STATE OF NORTH DAKOTA, } ss:  
County of Barnes,

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 28 day of Oct., 1890.

H. O. STERL,

Clerk of said Court.

STATE OF NORTH DAKOTA, } ss:  
County of Barnes,

District Court, 5th Judicial District.

I hereby certify that I have carefully compared the within instrument with the original now on file in this office and that it is a true and correct copy of the same.

In witness whereof, I have hereunto set my hand and official seal this 16 day of Dec., A. D. 1896.

[Seal of said Court.]

H. O. STERL,

Clerk Dist. Court within and for Barnes Co., N. D.

#### EXHIBIT B.

STATE OF NORTH DAKOTA, } ss:  
County of Barnes,

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }  
vs.  
JAMES L. SEMON, Defendant. }

*Decree for Plaintiff of Divorce "a Vinculo Matrimonii."*

(As amended *nunc pro tunc* by order of the court, dated December 16, 1896.)

This cause being brought by the above-named plaintiff, Maude E. Semon, to obtain a divorce "*a vinculo matrimonii*" from the above-named defendant, James L. Semon, on the ground of willful desertion and neglect, and it appearing to the court from the pleadings and papers on file in said cause; that the summons therein has been duly served on said defendant by an order heretofore made by and from this court, for the publication of said summons, and then and thereafter as an equivalent to such publication as by statute in such case made and provided, personal

service was secured on said defendant in the State of New York, —

The within decree amended by order of the court, dated Dec. 16th, 1896.

the defendant having appeared herein and answered and a [that the defendant failed to answer, demur, or to]\* and submitted himself to the jurisdiction of the court; [make any appearance whatever, as by the summons and the law required in such case, but instead thereof made default; that upon such default,]\* and upon the application of the plaintiff, the court on the 3rd day of January, 1891, duly referred this cause, by an order to John Anderson, a notary public within and for the county of Barnes and State of North Dakota, of Valley City, of said county and State, as referee, to take the evidence in the above-entitled action material to the allegations of said complaint, in the form of written questions and answers and report the same to this court; and the said referee having taken the testimony by written questions and answers, and reported the same to the court, and in all things obeyed the order of the court; and an application having been duly made to this court, representing that Mrs. Sarah C. McKee, William McKee, Sophia M. Drake and Mrs. C. Baker, all residing in the county of Kings and State of New York, were material witnesses on the part of the plaintiff in said cause, and that the personal attendance of said witnesses could not be procured at the trial of said action, the court duly appointed J. George Flammer, a notary public in and for the county of New York, and State of New York, of said city and State, sole commissioner to take the testimony of said witnesses upon the interrogatories attached to his said commission of appointment, and none others, and to return said testimony when duly signed and certified, together with said commission and the papers thereto annexed, to the clerk of this court, at Valley City, North Dakota, and

67 the said commissioner having taken the testimony of the said witnesses as required by said commission and reported the same to the clerk of this court, and in all things obeyed the order of the court, from which it appears that all the material allegations of the complaint aforesaid, are proven by testimony free from all legal exceptions, as to the competency, admissibility and sufficiency thereof; that said matter so alleged and proven in behalf of the plaintiff is sufficient to entitle her to the relief prayed for in her complaint; that the plaintiff was a resident of Barnes county and State of North Dakota at the commencement of this action, and had been for more than ninety days next preceding; that for more than one year immediately and next preceding the commencement of this action, said defendant had wilfully and without cause, deserted said plaintiff, and also since and during the time of his said desertion, had wilfully and without cause wholly neglected to provide said plaintiff and her two children born as the issue of the marriage with defendant, with the common necessities of life, and while plaintiff was a resident of this county and State aforesaid, said defendant continuously so deserted and neglected to provide

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[\* Words enclosed in brackets erased in copy.]

for said plaintiff and her said two children, and still continues to do so; that said plaintiff and defendant intermarried on the 12th day of May, 1885, and that the issue of said marriage, is Edna Kate Semon, born on the 8th day of June, 1886, and Randolph Alexander Semon, born on the 6th day of August, 1887, and that the same are now living.

Now, therefore, on motion of Winterer & Winterer, counsel for plaintiff, it is ordered, adjudged and decreed, by the court that the bonds of matrimony heretofore entered into between the said plaintiff, Maud E. Semon, and the said defendant, James L. Semon, on the 12th day of May, 1885, be hereby and are dissolved, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof; that the custody, care and education of the said children, the issue of the said marriage, be hereby and is awarded to the plaintiff, of  
68 which all persons interested are to take notice and govern themselves accordingly.

Dated at the city of Jamestown, county of Stutsman and State of North Dakota, this 26th day of January, 1891.

RODERICK ROSE, *Judge.*

Attest: H. O. STERL, *Clerk,*

By M. G. CUSHING, *Deputy.*

[Seal of said Court.]

(Endorsed.)

STATE OF NORTH DAKOTA, } ss :  
County of Barnes,

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 29th day of January, 1891.

H. O. STERL,

*Clerk of said Court,*

By M. G. CUSHING, *Deputy.*

STATE OF NORTH DAKOTA, } ss :  
County of Barnes,

In District Court, Fifth Judicial District.

I, H. O. Sterl, clerk of the district court in and for said county and State, do hereby certify that I have compared the papers in writing to which this certificate is attached with the decree of divorce filed in my office on the 29th day of January, A. D. 1891, in the above and foregoing action, to wit: Maud E. Semon vs. James L. Semon, and that the same is a true and correct copy of said decree and the whole thereof.

In testimony whereof, I have hereunto set my hand  
Seal of said and affixed the seal of the said court at Valley City  
Court. said county and State, this 23rd day of December,  
A. D. 1896.

H. O. STERL, *Clerk.*

69 STATE OF NORTH DAKOTA, } ss:  
     County of Barnes,

I, Roderick Rose, judge of the fifth judicial district of the State of North Dakota, do hereby certify that H. O. Sterl, whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, clerk of the district court of Barnes county aforesaid (which county is in the fifth judicial district) and keeper of the records and seal thereof, duly elected and qualified to office; that full faith and credit are and of right ought to be given to all his official acts as such in all courts of record and elsewhere; and that his said attestation is in due form of law and by the proper officer.

Given under my hand and seal this 23rd day of December, 1896.

RODERICK ROSE, [SEAL.]  
     District Judge.

STATE OF NORTH DAKOTA, } ss:  
     County of Barnes,

I, H. O. Sterl, clerk of the district court in and for said county, in the State aforesaid, do hereby certify that Roderick Rose, whose genuine signature is appended to the foregoing certificate was, at the time of signing the same, judge of the district court of the fifth judicial district of the State of North Dakota (of which judicial district the said Barnes county forms a part), duly commissioned and qualified; that full faith and credit are and of right ought to be given to all his official acts as such, in all courts of record and elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Valley City, in said county and State, this 23rd day of December, A. D. 1896.

H. O. STERL, Clerk.

70 I, C. M. Dahl, by William O. De Puy, deputy secretary of state in and for the State of North Dakota, do hereby certify that the district court of the fifth judicial district, including the county of Barnes, in the State of North Dakota, is organized and existing under, by virtue of and pursuant to the constitution and laws of the State of North Dakota; that said court is a court of general jurisdiction; that the present judge of said court is the Hon. Roderick Rose, the identical person who has signed the annexed certificate. That I am acquainted with the signature of the said judge and know that the signature attached to said certificate purporting to be his signature is in his handwriting and is genuine.

Dated December 23d, A. D. 1896.

C. M. DAHL,  
     Secretary of State,  
 By WILLIAM O. DE PUY,  
     Deputy Sec. of State.

[SEAL.]

71

## Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration on the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on November 10th, 1896.

Before Hon. George B. Abbott, surrogate.

SURROGATE'S COURT, BROOKLYN, *January 20th, 1897.*

*Appearances of Counsel.*

For the petitioner, W. Harlock, Esq.

For the respondent-, Messrs. Arnold & Greene, by Mr. Arnold.

MR. ARNOLD: I offer in evidence exemplified copy of the judgment-roll in the matter of Maude E. Semon vs. James L. Semon in the district court of the State of North Dakota, for the fifth judicial district county of Barnes.

Marked "Respondents' Exhibit 1, January 20th, 1897," being Exhibits A, B, C, D, E, F, G, H, I, J, and A 1, annexed to respondents' answer and printed in the foregoing pages, 24 to 45.

MR. HARLOCK: I offer in evidence exemplified copy of the proceedings of the district court of North Dakota, amending a decree of divorce in that court January 26th, 1891, being Exhibit A annexed to the petitioner's reply. Also an exemplified copy of the said decree of divorce as amended, bearing date the 16th day of December, 1896, being Exhibit B, claiming that these two papers, A and B, as well as the decree of the alleged judgment-roll offered in evidence by respondents, are the entire judgment-roll of that case in that court.

MR. ARNOLD: I object to the proceedings taken in the court of North Dakota to amend the judgment-roll, on the ground that they are incompetent, irrelevant and immaterial; that these respondents had no notice of these proceedings and are not parties to it; that the rights acquired by Mrs. Kimball and Mrs. James, two of the respondents, as heirs-at-law and next of kin of Edward C. Kimball, deceased, in real and personal estate left by him, are not and cannot in anywise be affected or impaired by such proceedings or the order or decree of the court made therein; and that said proceedings and the order or decree made therein do not in any manner affect the question of the validity of the alleged marriage between said Kimball and the petitioner herein. The papers referred to are marked Petitioner's Exhibits A and B, January 20th, 1897, being Exhibits A and B annexed to petitioner's reply and printed in the foregoing pages, 49 to 69.

The evidence is taken subject to the objection, and will be passed upon on consideration of the matter, with an exception to be granted to the party against whom the ruling may be made.



Mr. HARLOCK: I also offer in evidence the Compiled Laws of the Territory of Dakota of 1887, and the Revised Codes of the State of North Dakota of 1895, to show that these proceedings were regular and sufficient; and that the divorce was legal and valid under those laws.

Same objection on the grounds above stated and same disposition, with the same objection to be allowed as to the previous offer.

The following facts are admitted subject to the objection and exception of either party:

73 First. The respondents admit that they and Edward C. Kimball, the deceased, knew at the time the petitioner was married to Kimball that the petitioner was a divorced woman at that time, but they had no knowledge as to the methods by which such divorce was obtained, nor whether it was valid. They did not know at the time of such marriage whether James L. Semon, former husband of the petitioner, was living or not; but subsequently ascertained that he was living.

Second. The petitioner admits that she was living in North Dakota from June 5th, 1890, to February 5th, 1891.

Third. The petitioner admits that at the time when she commenced her action for divorce against James L. Semon, in the district court of North Dakota, Semon was a resident of the State of New York, and that he ever since has been a resident of such State.

W. HARLOCK,  
Attorney for Petitioner.  
ARNOLD & GREENE,  
Attorneys for Respondents.

Petitioner rests.

The SURROGATE: I will mark it submitted and briefs may be presented within two weeks.

The surrogate subsequently handed down a memorandum overruling the objections made by Mr. Arnold and granting him an exception thereon.

74 *Extracts from Compiled Laws of the Territory of Dakota of 1887, which Became Laws of the State of North Dakota on its Admission to the Union.*

The State of North Dakota was duly admitted into the Union by proclamation issued by the President of the United States on November 2d, 1889.

The constitution of the State of North Dakota was adopted on October 1st, 1889, and section 2 of article 20 of the said constitution is as follows: "All laws now in force in the Territory of Dakota, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations or be altered or repealed."

The laws of the Territory of Dakota in force at the time of the commencement of the action for divorce referred to in the answer of the respondents herein, and the laws of the State of North Da-

kota at the times mentioned in the petition, answer and reply herein, provided, among other things, as follows :

The organic law, page 20, Compiled Laws of Territory of Dakota, 1887, provides as follows :

SECTION 39. Hereafter the supreme court of the Territory of Dakota shall consist of a chief justice and five associate justices, any five of whom shall constitute a quorum.

SECTION 41. Said Territory shall be divided into six judicial districts, and a district court shall be held in each district by one of the justices of the supreme court at such time and place as may be prescribed by law.

The following are provisions of the Compiled Laws of the Territory of Dakota of 1887 :

SECTION 2501. Law is a rule of property and of conduct prescribed by the sovereign power.

SECTION 2502. The will of the sovereign power is expressed :

1. By the organic act passed by Congress creating a temporary government in this Territory and vesting the legislative power in the governor and a legislative assembly, and extending it to all rightful subjects of legislation consistent with the Constitution of the United States and that act.

2. By other statutes enacted by Congress or by the legislative assembly.

SEC. 2558. Marriage is dissolved only :

1. By the death of one of the parties ; or,  
2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties. The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons. The district court in each county or subdivision has such jurisdiction in an action.

SEC. 2559. Divorces may be granted for any of the following causes :

1. Adultery.
2. Extreme cruelty.
3. Willful desertion.
4. Willful neglect.
5. Habitual intemperance.
6. Conviction for felony.

SEC. 2561. Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage.

SEC. 2562. Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert.

1. Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion.

2. When one party is induced by the stratagem or fraud of the other party to leave the family dwelling place, or to be absent, and during such absence the offending party departs with intent to de-

sert the other, it is desertion by the party committing the stratagem or fraud, and not by the other.

76 3. Departure or absence of one party from the family dwelling place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other is not desertion by the absent party, but it is desertion by the other party.

4. Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion.

5. Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation.

6. Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion.

7. If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfil the marriage contract, and solicits condonation, the desertion is cured. If the other party refuse such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of the refusal.

8. The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion.

9. If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him.

SEC. 2563. Willful neglect is the neglect of the husband to provide for his wife the common necessities of life, he having ability to do so; or it is the failure to do so by reason of idleness, profligacy or dissipation.

SEC. 2564. Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party.

77 SEC. 2565. Willful desertion, willful neglect or habitual intemperance must continue for one year before either is a ground for divorce.

SEC. 2566. Divorces must be denied upon showing:

1. Connivance; or,
2. Collusion; or,
3. Condonation; or,
4. Recrimination; or,
5. Limitation and lapse of time.

SEC. 2567. Connivance is the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce. Corrupt consent is manifest by passive permission, with intent to connive at or actively procure the commission of the acts complained of.

SEC. 2568. Collusion is an agreement between husband and wife that one of them shall commit, or appear to have committed, or to

be represented in court as having committed acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce.

SEC. 2569. Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce.

SEC. 2570. The following requirements are necessary to condonation :

1. A knowledge on the part of the condoner of the facts constituting the cause of divorce.

2. Reconciliation and remission of the offense by the injured party.

3. Restoration of the offending party to all marital rights. Condonation implies a condition subsequent, that the forgiving party must be treated with conjugal kindness. Where the cause of divorce consists of a course of offensive conduct, or arises in cases of cruelty from excessive acts of ill-treatment, which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone. In such cases, condonation can be made

78 only after the cause of divorce has become complete, as to the acts complained of. A fraudulent concealment by the condonee of facts constituting a different cause of divorce from the one condoned, and existing at the time of condonation, avoids such condonation.

SEC. 2571. Condonation is revoked and original cause of divorce revived :

1. When the condonee commits acts constituting a like or other cause of divorce ; or,

2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled.

SEC. 2578. A divorce must not be granted unless the plaintiff has, in good faith, been a resident of the Territory ninety days next preceding the commencement of the action.

SEC. 2579. In actions for divorce, the presumption of law that the domicile of the husband is the domicile of the wife, does not apply. After separation each party may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions.

SEC. 2580. No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties, or upon any statement or finding of fact made by a referee ; but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged.

SECTION 3279. The proof or acknowledgement of an instrument may be made without the Territory, but within the United States, and within the jurisdiction of the officer, before either \* \* \*

3. A notary public.

SECTION 3288. 4. Officers taking and certifying acknowledgments or proof of instruments for record must authenticate their certificates by affixing thereto their signatures followed by the names of  
79 their offices; also their seals of office, if by the laws of the Territory, State or county where the acknowledgment or proof is taken, or by authority by which they are acting they are required to have official seals.

SECTION 4715. The law respects form less than substance.

SECTION 4716. That which ought to have been done is to be regarded as done in favor of him to whom, and against him from whom performance is due.

SECTION 4728. An interpretation which gives effect is preferred to one which makes void.

SECTION 4817. The following are the courts of justice of this Territory: 1. The supreme court. 2. The district courts. \* \* \*

SECTION 4824. The district courts possess chancery as well as common-law jurisdiction.

SECTION 4825. They have exclusive original jurisdiction in all actions or proceedings in chancery \* \* \* and in all actions for divorce, and to obtain a decree of nullity of marriage.

SECTION 4890. In all other cases (to wit, cases other than those relating to real property) the action shall be tried in the judicial subdivision in which the defendant resides \* \* \* or if none of the defendants reside in the Territory, the same may be tried in any county which the plaintiff shall designate in his complaint.

SECTION 4891. If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein unless the defendant, before the time for answering expire, demands in writing that the trial be had in the proper county. \* \* \*

SECTION 4892. Civil actions in the courts of this Territory shall be commenced by the service of a summons.

SECTION 4893. The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint and serve a copy of his answer on the  
80 person whose name is subscribed to the summons at the place within the Territory to be therein specified, in which there is a post-office, within thirty days after the service of the summons, exclusive of the day of service.

SECTION 4900. Where the person on whom the service of the summons is to be made, cannot, after due diligence, be found within the Territory and that fact appears by affidavit to the satisfaction of the court or a judge thereof, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made; \* \* \* such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases: \* \* \*

5. When the action is for divorce, or for a decree annulling a marriage \* \* \*

When publication is ordered, personal service of a copy of the

summons and complaint out of the Territory is equivalent to publication.

SECTION 4904. From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings.

A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

SECTION 4908. The only pleading on the part of defendant is either a demurrer or an answer. It must be served within 30 days after the service of a copy of the complaint.

SECTION 4914. The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

SECTION 4921. Every pleading in a court of record must be subscribed by the party or his attorney; and when any pleading is verified, every subsequent pleading except a demurrer must be verified also.

SECTION 4922. The verifications must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated upon information and belief, and as to those matters he believes it to be true. \* \* \*

Such verification must be by the affidavit of the party.

SECTION 4924. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties.

SECTION 4938. The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.

SECTION 4939. The court may, likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this code or by an order, enlarge such time, and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code the court may, in like manner, and upon like terms, permit an amendment of such proceedings, so as to make it conformable thereto.

SECTION 4941. The court shall, in every stage of action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.



SEC. 5260. When defendant permitted to defend. The defendant, upon whom service by publication is made, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant, upon whom service by publication is made, or his representatives, may, in like manner upon good cause shown, be allowed to defend, after judgment, or at any time within one year after notice thereof and within seven years after its rendition, on such terms as may be just; and, if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs, but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.

SECTION 5281. An affidavit may be used to verify a pleading.  
\* \* \*

SECTION 5282. An affidavit may be made in and out of this Territory before any person authorized to administer an oath.

SECTION 5329. Service by mail may be made where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail.

SECTION 5330. In case of service by mail the paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

SECTION 5336. Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney instead of the party.

SECTION 5339. If any process original pleadings or any other paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

SECTION 5341. It shall not be necessary to entitle an affidavit in the action, but an affidavit made without a title or with a defective title, shall be as valid and effectual, for every purpose, as if it were duly entitled, if it intelligently refer to the action or proceeding in which it is made.

83 *Extract from Revised Codes of North Dakota, 1895.*

SEC. 5415. Origin and classes of issues. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other. There are two kinds.

1. Of law.
2. Of fact.

SEC. 5417. Of fact classified. The issue of fact arises upon the material allegations in the complaint controverted by the answer.

\* \* \*

SEC. 5419. Trial defined. A trial is the judicial examination of the issues between the parties whether they are issues of law or of fact.

SEC. 5421. Issues of fact how tried. All issues of fact triable by a



jury or by a court must be tried before a single judge. Issues of fact must be tried at a regular term of the district court when the trial is by jury, otherwise at a regular or special term as the court may by its rules prescribe. \* \* \*

SEC. 5422. Note of issue, &c. At any time after issue and at least ten days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk at least eight days before the court with a note of the issue containing the title of the action, the names of the attorneys and the time when the last pleading was served, and the clerk shall thereupon enter the cause upon the calendar according to the date of the issue. \* \* \*

SEC. 5423. Either party proceeds, &c. Either party, when the case is reached upon the calendar, and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case and take a dismissal of the complaint or a verdict or judgment as the case may require.

SEC. 5479. Judgment entered by the clerk on order. Judgment upon issue of law or fact or upon confession or upon failure  
84 to answer may be entered by the clerk upon order of the court or of the judge thereof.

SEC. 5480. Notice of entry of judgment served. Within ten days after entry of judgment in an action in which an appearance has been made, notice of such entry, together with a general description of the nature and amount of relief and damages thereby granted shall be served by the prevailing upon the adverse party.

SEC. 5489. Judgment-roll contents. Unless the party or his attorney shall furnish a judgment-roll, the clerk, immediately after entering judgment, shall attach together and file the following papers which shall constitute the judgment-roll:

1. In case the complaint is not answered by any defendant, the summons and complaint or copies thereof, the affidavit for service of summons by publication, if any, proof of service and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings or copies thereof, the verdict, decision or report, the offer of the defendant, a copy of the judgment, the statement of the case, if any, and all orders and papers in any way involving the merits and necessarily affecting the judgment.

85

### Kings County Surrogate's Court.

In the Matter of the Application of Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for Revocation of Letters Issued, &c.

#### *Opinion.*

At the time of the marriage ceremony between the intestate and the petitioner a decree of divorce had been granted by a North Dakota court which purported to dissolve the marriage tie between the petitioner and her husband, James L. Semon, upon grounds

which are not recognized in this State as entitling the plaintiff to an absolute divorce.

The recitals of the decree and the judgment-roll showed that it had been granted upon a personal service of process upon the defendant in this State, and upon the defendant's default, and it appears that the defendant was, at the time of the commencement of the suit, and ever since has been, a resident of this State.

Upon these facts the marriage contract between the intestate and the petitioner was absolutely void.

O'Dea vs. O'Dea, 101 N. Y., 23.

No change or amendment of the decree or judgment-roll in the divorce proceedings was ever made during the lifetime of the intestate. Therefore, at the time of his death the decree of divorce was still absolutely void, and the relation of husband and wife between him and the petitioner had never in fact existed.

After the intestate's death an amendment of the original decree of divorce was procured, so as to recite the appearance of the defendant. The amendment was made *nunc pro tunc* as of the date of the original decree.

86 I am of the opinion that such an amendment could not be made after the intestate's death, so as to render valid and lawful a relation which had been absolutely void during his entire life, and which would have the effect of divesting property rights which had already attached to the intestate's assets.

Moreover, I am of the opinion, upon the undisputed facts, that the North Dakota court had not jurisdiction to make the amendment.

The letter which is in evidence and referred to as constituting the appearance of the defendant is not in any sense or upon any theory of practice an appearance in the suit. It is not entitled, is improperly verified, contains no demand for relief, and does not even contain any intimation of any intention on the part of the defendant to appear and submit himself to the jurisdiction of the court. It is a mere verified letter and nothing more.

But, if it has any force whatever in the suit, it is a pleading which raises an issue which entitled the defendant to a trial upon some sort of notice to him. The record does not show any such notice.

Application denied.

Dated March 1st, 1897.

GEO. B. ABBOTT, *Surrogate*.

87

## Surrogate's Court, Kings County.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Decision.*

Harriet A. Kimball, Harriet I. James and John S. James, the respondents herein, request the surrogate to make the following findings of fact and conclusions of law, viz:

*Findings of Fact.*

First. The said Edward C. Kimball died in the city of Brooklyn on the 9th day of November, 1896, intestate, leaving him surviving his mother Harriet A. Kimball and his sister Harriet I. Kimball as his only next of kin, and on the 10th day of November, 1896, letters of administration on his estate were duly issued by the surrogate of Kings county to the said Harriet A. Kimball and to John S. James.

Found. G. B. A.

Second. The petitioner Maude E. Kimball was married on the 12th day of May, 1885, at the city of New York to one James L. Semon of said city.

Found. G. B. A.

88 Third. Subsequently the said petitioner left her said husband, and, in June, 1890, went to the State of North Dakota, where, in the month of September, 1890, she commenced an action in the district court, fifth judicial district of the said State of North Dakota, county of Barnes, for a divorce from her said husband.

Found. G. B. A.

Fourth. The said James L. Semon is and ever since his marriage to the said petitioner has been a resident of the State of New York; he was not served with the summons in said divorce suit in said State of North Dakota, nor did he appear in said action in person or by attorney, but said summons in said action was served upon him in the city of New York, on the 15th day of October, 1890. Such proceedings were thereafter had in said action that on the 26th day of January, 1891, said court made a decree granting a divorce to the petitioner from her said husband, in which decree it was recited that the summons and complaint were served on said Semon in the city of New York and that he did not appear in said action or serve any answer or demurrer to the complaint therein.

Found. G. B. A.

Fifth. The said petitioner went to North Dakota on the 5th day of June, 1890, and stayed there until the 5th day of February, 1891. During that period the domicile of her husband was in the State of New York. The petitioner went to North Dakota for the purpose of procuring a divorce from her husband on grounds not recognized

by the laws of the State of New York as sufficient cause for granting a divorce.

Found. G. B. A.

Sixth. On the 29th day of June, 1895, the petitioner went through a marriage ceremony in the city of Brooklyn with said Edward C. Kimball, deceased.

Found. G. B. A.

Seventh. The said deceased knew on the 29th day of June, 1895, that the petitioner was then a divorced woman, but he had  
89 no knowledge as to the methods by which such divorce was obtained nor did he know that it was invalid. He did not know at the time he entered into said marriage contract with the petitioner whether James L. Semon was living, but ascertained subsequently that he was still living.

Found. G. B. A.

Eighth. After the death of said Edward C. Kimball, and in December, 1896, the said James L. Semon applied to the court of North Dakota, which granted the decree of divorce, to have a letter, which he sent to the plaintiff's attorneys after receiving the summons in the divorce action, filed in said court as his answer in the divorce  
90 suit *nunc pro tunc* as of the date of its receipt by the plaintiff's attorneys, and to have said decree of divorce, made on the 26th day of January, 1891, amended *nunc pro tunc* as of that date, by striking out the recital to the effect that the defendant failed to answer, demur or make any appearance in said divorce suit, and by inserting in place thereof the following words: "The defendant having appeared herein and answered and submitted himself to the jurisdiction of the court." Notice of said application was given only to the attorneys who appeared for the plaintiff in that divorce suit, and an order was made by the said court on the 16th day of December, 1896, on default of the plaintiff, granting said application, and purporting to amend said decree of divorce *nunc pro tunc* in accordance with said application, but said court did not have the power or jurisdiction to make such an order.

Found. G. B. A.

#### *Conclusions of Law.*

First. The court of North Dakota, which granted the decree of divorce to the petitioner from the said James L. Semon did not acquire jurisdiction of the said James L. Semon in that action, and the said decree of divorce made by said court was and is a nullity.

Found. G. B. A.

90 Second. The court of North Dakota did not have jurisdiction to make said order of December 16th, 1896, amending the said decree of divorce *nunc pro tunc*, and said order was and is a nullity.

Found. G. B. A.

Third. The said order of the court of North Dakota, dated December 16th, 1896, amending the decree of divorce *nunc pro tunc*, was not and is not binding upon the respondents herein, and did not

in anywise affect or impair their rights or interests as heirs- and next of kin of said Edward C. Kimball, deceased, in the real and personal property left by him.

Found. G. B. A.

Fourth. The said petitioner was, when she entered into the marriage ceremony with said Edward C. Kimball, the wife of James L. Semon, and could not and did not contract a lawful marriage with said Edward C. Kimball.

Found. G. B. A.

Fifth. The said petitioner is not the widow of said Edward C. Kimball, deceased, and is not entitled, as such widow, to letters of administration on his estate.

Found. G. B. A.

Sixth. The said Harriet A. Kimball, the mother of said Edward C. Kimball, deceased, as one of the next of kin of said deceased, was entitled to letters of administration on his estate and to have John S. James joined with her in the administration of said estate.

Found. G. B. A.

Dated Brooklyn, March 6, 1897.

GEO. B. ABBOTT, *Surrogate*.

91 At a surrogate's court held in and for Kings county at the hall of records in the city of Brooklyn on the 8th day of March, 1897.

Present: Hon. George B. Abbott, surrogate.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Decree Dismissing Petition of Maude E. Kimball.*

An order having been granted by the surrogate's court in this matter on the 18th day of December, 1896, upon the petition of one Maude E. Kimball verified December 17, 1896, and upon the affidavits of Maude E. Kimball verified December 17, 1896, of Mame F. Cavendy and of William B. Smith, both verified on the same day, and on the petition of Harriet A. Kimball verified November 10, 1896, and all proceedings had thereon, that a citation issue herein to Harriet A. Kimball, John S. James and Harriet I. James requiring them to show cause on a day and hour to be named in said citation before the surrogate of Kings county why the prayer of said petitioner should not be granted and why the petitioner should not have such other relief as might be just; and in the meantime and until further order herein staying all proceedings on the part of said Harriet A. Kimball and John S. James, or either of them, as administratrix and administrator of the goods, &c., of Edward C. Kimball, deceased; and a citation having thereupon issued as directed in said order, returnable on the 6th day of January, 1897, requiring the said Harriet A. Kimball and John S.

James, as administratrix and administrator of the goods, chattels, and credits which were of Edward C. Kimball, deceased, and the said Harriet I. James then to show cause why a decree should not be made revoking the letters of administration of the goods, chattels and credits which were of said Edward C. Kimball, deceased, heretofore and on the 10th day of November, 1896, issued to said Harriet A. Kimball and John S. James by the surrogate's court of the county of Kings; and why letters of administration on the estate of said deceased Edward C. Kimball should not be issued to Maude E. Kimball, as the widow of said deceased, and in the meantime, and until the further order of said court, staying all proceedings on the part of said Harriet A. Kimball and John S. James as such administratrix and administrator; and said citation having been returned and filed in this court, with proof of due service thereof on the parties therein named:

And the petitioner, having appeared on the return day of said citation by W. Harlock, Esq., her counsel; and the said Harriet A. Kimball and John S. James and Harriet I. James having appeared by L. H. Arnold, Esq., their counsel; and the said Harriet A. Kimball, John S. James and Harriet I. James having filed their answer to said petition; and the petitioner having thereafter filed a reply to said answer; and certain evidence having been submitted on behalf of the said petitioner and of said respondents; and the said petitioner and the said respondents having been heard by their counsel, and due deliberation having been thereupon had,

Now, on reading and filing said order of December 18, 1896, and said citation and all the papers on which the same were granted which are hereinbefore mentioned; the answer of the respondents and the reply of the petitioner thereto and all the proof submitted on behalf of the respective parties, including certain admitted facts contained in a written statementsigned by the attorneys for the respective parties.

On motion of Arnold, Greene & Patterson, attorneys for the respondents,

It is ordered, adjudged and decreed that the petitioner the said Maude E. Kimball is not the widow of Edward C. Kimball, deceased, and is not entitled as his widow to letters of administration of the goods, chattels and credits which were of said Edward C. Kimball, deceased.

It is further ordered, adjudged and decreed that the application of said petitioner for the revocation of letters of administration heretofore, and on the 10th day of November, 1896, granted by the surrogate of Kings county to Harriet A. Kimball and John S. James of the goods, chattels and credits which were of Edward C. Kimball, deceased, and for letters of administration in favor of said petitioner of the goods, chattels and credits which were of said Edward C. Kimball, deceased, be dismissed.

And it is further ordered, adjudged and decreed that the stay of proceedings granted in said order of this court, bearing date the

18th day of December, 1896, and in the citation issued as therein provided, be vacated.

GEO. B. ABBOTT, *Surrogate*.

(A copy.)

JOSEPH W. CARROLL,  
[L. s.] *Clerk of the Surrogate's Court.*

94                      Surrogate's Court, Kings County.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Petitioner's Requests to Find.*

The petitioner hereby requests the surrogate to make the following findings of fact and conclusions of law, to wit:

*Findings of Fact.*

First. That Edward C. Kimball departed this life at the city of Brooklyn, county of Kings and State of New York, on the 9th day of November, 1896, intestate, and was at the time of his death and immediately prior thereto a resident of the county of Kings aforesaid.

Not found. G. B. A.

Second. That the petitioner, Maude E. Kimball, is the widow of said Edward C. Kimball, deceased.

Not found. G. B. A.

Third. That the said Edward C. Kimball was at the *the* time of his death the owner of certain personal property and of certain real estates.

Not found. G. B. A.

95                      Fourth. That the said Edward C. Kimball left him surviving (the petitioner, Maude E. Kimball, his widow, and) the respondent Harriet A. Kimball, his mother, and Harriet I. James, his sister, his only next of kin.

Found except matter in parentheses. G. B. A.

Fifth. That the said Harriet A. Kimball presented a petition to the surrogate of Kings county, dated the 10th day of November, 1896, praying that letters of administration upon the estate of the said Edward C. Kimball, deceased, be issued to said Harriet A. Kimball and one John S. James, and that without notice or citation to said Maude E. Kimball, and without her knowledge or consent, and without any waiver from said Maude E. Kimball of her right to administer, said surrogate on the 10th day of November, 1896, issued letters of administration upon the estate of said Edward C. Kimball, deceased, to said Harriet A. Kimball and John S. James.

Found. G. B. A.

Sixth. The said petition of Harriet A. Kimball alleged, among



other things, that said Edward C. Kimball was unmarried at the time of his death and left him surviving no widow.

Found. G. B. A.

Seventh. That the allegation in said petition of Harriet A. Kimball that said Edward C. Kimball was unmarried at the time of his death and left him surviving no widow was false and untrue.

Not found. G. B. A.

Eighth. That the grant of said letters of administration upon the estate of said Edward C. Kimball, as aforesaid, was obtained by a false suggestion of a material fact; to wit, by the allegation that said Edward C. Kimball was unmarried at the time of his death, and left him surviving no widow.

Not found. G. B. A.

96 Ninth. That Maude E. Kimball, the petitioner, was (lawfully) married to said Edward C. Kimball, deceased, in the city of Brooklyn, on the 29th day of June, 1895 (and remained the wife of said Edward C. Kimball until his death).

Found, except as to matter in parentheses. G. B. A.

Tenth. That prior to said 29th day of June, 1895, said Maude E. Kimball had been lawfully divorced from her former husband, James L. Semon, by a decree of the district court of the fifth judicial district in and for the county of Barnes and State of North Dakota, duly given and made on the 26th day of January, 1891, and that thereby the bonds of matrimony theretofore entered into between the said Maude E. Kimball (then named Maude E. Semon) and the said James L. Semon on the 12th day of May, 1885, were dissolved, and they and each of them were freed and absolutely released from the bonds of matrimony and all the obligations thereof.

Not found. G. B. A.

Eleventh. That the said district court of the fifth judicial district in and for the county of Barnes and State of North Dakota had jurisdiction of the persons of said Maude E. Kimball (then named Maude E. Semon), and of said James L. Semon and of the subject-matter of said decree at the time of making such decree.

Not found. G. B. A.

Twelfth. That the said court had and obtained jurisdiction of the person of said James L. Semon, the defendant in the action for divorce, before making said decree.

Not found. G. B. A.

Thirteenth. That said decree was (duly) amended by said court on the 16th day of December, 1896, so as to recite the fact that the defendant James L. Semon had appeared in the action for divorce and answered and had submitted himself to the jurisdiction of the court before the entry of the original decree in said action.

Found, except as to matter in parentheses. G. B. A.

Fourteenth. That at the time of the marriage of said Maude E. Kimball to said Edward C. Kimball, deceased, her previous marriage on the 12th day of May, 1885, to James L. Semon was not in force.

Not found. G. B. A.

Fifteenth. That the respondents and the said Edward C. Kimball, deceased, knew at the time the petitioner was married to said Edward C. Kimball that she was a divorced woman at that time.

Found. G. B. A.

*Conclusions of Law.*

First. That the petitioner, Maude E. Kimball, is entitled to administer upon the estate of said Edward C. Kimball, deceased.

Not found. G. B. A.

Second. That the grant of letters of administration upon the estate of said Edward C. Kimball to Harriet A. Kimball and John S. James was obtained by a false suggestion of a material fact.

Not found. G. B. A.

Third. That Harriet A. Kimball and Harriet I. James, next of kin of said deceased, and John S. James have no right and are not entitled to letters of administration upon the estate of said Edward C. Kimball as against the said Maude E. Kimball.

Not found. G. B. A.

Fourth. That the letters of administration upon the goods, chattels and credits of Edward C. Kimball, deceased, issued by the surrogate of Kings county on the 10th day of November, 1896, to Harriet A. Kimball and John S. James should be revoked and the same are hereby revoked.

Not found. G. B. A.

98 Fifth. That letters of administration upon the estate of said Edward C. Kimball, deceased, be issued to Maude E. Kimball, widow of said deceased.

Not found. G. B. A.

Dated March 19th, 1897.

W. HARLOCK,

*Attorney for the Petitioner, Maude E. Kimball.*

Surrogate's Court, Kings County.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Exceptions.*

The petitioner Maude E. Kimball hereby excepts to the findings and refusals to find herein made by Hon. Geo. B. Abbott, surrogate, filed in the office of the surrogate, Kings county, on the sixth day of March, 1897, and on the fourth day of April, 1897, and also to the decision and decree made by said surrogate herein dismissing the petition of said petitioner herein dated, entered and filed in said office on the 8th day of March, 1897, as follows:

99

*First Exception.*

Said petitioner excepts to each and every part of said decree.

*Second Exception.*

To the first finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

*Third Exception.*

To the second finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

*Fourth Exception.*

To the third finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

*Fifth Exception.*

To the fourth finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

*Sixth Exception.*

To the fifth finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

*Seventh Exception.*

To the sixth finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

*Eighth Exception.*

To the seventh finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

100

*Ninth Exception.*

To the eighth finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

*Tenth Exception.*

To the first conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

*Eleventh Exception.*

To the second conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

*Twelfth Exception.*

To the third conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

*Thirteenth Exception.*

To the fourth conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

*Fourteenth Exception.*

To the fifth conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

*Fifteenth Exception.*

To the sixth conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

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*Sixteenth Exception.*

To the refusal of said surrogate to make and find the first finding of fact contained in petitioner's requests to find.

*Seventeenth Exception.*

To the refusal of said surrogate to make and find the second finding of fact contained in petitioner's requests to find.

*Eighteenth Exception.*

To the refusal of said surrogate to make and find the third finding of fact contained in petitioner's requests to find.

*Nineteenth Exception.*

To the refusal of said surrogate to make and find the fourth finding of fact contained in petitioner's requests to find.

*Twentieth Exception.*

To the refusal of said surrogate to make and find the seventh finding of fact contained in petitioner's requests to find.

*Twenty-first Exception.*

To the refusal of said surrogate to make and find the eighth finding of fact contained in petitioner's requests to find.

*Twenty-second Exception.*

To the refusal of said surrogate to make and find the ninth finding of fact contained in petitioner's requests to find.

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*Twenty-third Exception.*

To the refusal of said surrogate to make and find the tenth finding of fact contained in petitioner's requests to find.

*Twenty-fourth Exception.*

To the refusal of said surrogate to make and find the eleventh finding of fact contained in petitioner's requests to find.

*Twenty-fifth Exception.*

To the refusal of said surrogate to make and find the twelfth finding of fact contained in petitioner's requests to find.

*Twenty-sixth Exception.*

To the refusal of said surrogate to make and find the thirteenth finding of fact contained in petitioner's requests to find.

*Twenty-seventh Exception.*

To the refusal of said surrogate to make and find the fourteenth finding of fact contained in petitioner's requests to find.

*Twenty-eighth Exception.*

To the refusal of said surrogate to make and find the first conclusion of law contained in petitioner's requests to find.

*Twenty-ninth Exception.*

To the refusal of said surrogate to make and find the second conclusion of law contained in petitioner's requests to find.

103

*Thirtieth Exception.*

To the refusal of said surrogate to make and find the third conclusion of law contained in petitioner's requests to find.

*Thirty-first Exception.*

To the refusal of said surrogate to make and find the fourth conclusion of law contained in petitioner's requests to find.

*Thirty-second Exception.*

To the refusal of said surrogate to make and find the fifth conclusion of law contained in petitioner's requests to find.

Dated New York, April 21st, 1897.

W. HARLOCK,  
Attorney for Petitioner, 20 Nassau Street, New York City.

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## Surrogate's Court, Kings County.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Notice of Appeal.*

Take notice that Maude E. Kimball, the petitioner in the above-entitled matter, hereby appeals to the appellate division of the supreme court, in the second judicial department, from the decree entered herein on the eighth day of March, 1897, and from each and every part thereof, and that on such appeal the appellant will bring up for review both the law and the facts, and the said appeal is taken both on the law and the facts.

Dated April 5th, 1897.

WALDGRAVE HARLOCK,

*Attorney for said Maude E. Kimball, Petitioner.*

To Hon. George B. Abbott, surrogate of Kings county; to Arnold & Greene, Esqs., attorneys for Harriet A. Kimball and John S. James, administratrix and administrator, &c., of Edward C. Kimball, deceased, and Harriet I. James, respondents.

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## Surrogate's Court, Kings County.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

*Undertaking on Appeal.*

Whereas, on the eighth day of March, 1897, a decree was made by the above-named court in the above-entitled matter dismissing the application of Maude E. Kimball for the revocation of letters of administration granted by the surrogate of Kings county on November 10th, 1896, to Harriet A. Kimball and John S. James of the goods, &c., of Edward C. Kimball, deceased, and for letters in her favor.

And, whereas, the said Maude E. Kimball, feeling aggrieved thereby, intends to appeal therefrom to the appellate division of the supreme court in the second judicial department;

Now, therefore, we, William McKee, residing at No. 1170 Dean street, in the city of Brooklyn, county of Kings and State of New York, and Sarah C. McKee, also residing at No. 1170 Dean street, in said city of Brooklyn, do hereby, pursuant to the statute, jointly and severally undertake to and with the people of the State of New

106 York, that the appellant, Maude E. Kimball, will pay all costs and damages which may be awarded against her upon the appeal, not exceeding two hundred and fifty dollars (\$250).

Dated the 1st day of April, 1897.

WILLIAM McKEE.  
SARAH C. McKEE.

CITY OF BROOKLYN, } ss:  
County of Kings,

William McKee, being sworn, says that he is a resident and a freeholder within the State of New York, and worth double the sum specified in the above undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

WILLIAM McKEE.

Sworn to before me this 1st day of April, 1897.

THOS. W. HARRIS,  
Notary Public, Kings Co.

CITY OF BROOKLYN, } ss:  
County of Kings,

Sarah C. McKee, being sworn, says that she is a resident and freeholder within the State of New York, and worth double the sum specified in the above undertaking, over all the debts and liabilities which she owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

SARAH C. McKEE.

Sworn to before me this 1st day of April, 1897.

THOS. W. HARRIS,  
Notary Public, Kings Co.

107 STATE OF NEW YORK, } ss:  
County of Kings,

I certify that on this first day of April, 1897, before me personally appeared the above-named William McKee and Sarah C. McKee, to me known and known to me to be the individuals described in, and who executed the above undertaking, and severally acknowledged that they executed the same for the uses and purposes therein mentioned.

[L. S.]

THOS. W. HARRIS,  
Notary Public, Kings Co., N. Y.

We hereby consent that the foregoing case be settled, ordered filed, and annexed to the judgment-roll without further notice.

May 25, 1897.

W. HARLOCK,  
Attorney for Petitioner.  
ARNOLD & GREENE,  
Attorneys for Respondents.



The foregoing case, containing all the evidence taken upon the trial of this proceeding, is hereby settled, and ordered filed and annexed to the judgment-roll.

Dated May 25th, 1897.

GEO. B. ABBOTT, *Surrogate*.

108 At a term of the appellate division of the supreme court, held in and for the second judicial department at the city of Brooklyn, on the 22d day of June, 1897.

Present: Hon. William W. Goodrich, presiding justice; Hon. Edgar M. Cullen, Hon. George B. Bradley, Hon. Willard Bartlett, Hon. Edward W. Hatch, justices.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD KIMBALL, Deceased, etc.

*Order of Affirmance on Appeal from Surrogate.*

Maude E. Kimball, the petitioner in this proceeding, having appealed to the appellate division of the supreme court from a decree of the surrogate's court of the county of Kings, made on the 8th day of March, 1897, ordering, adjudging and decreeing that the petitioner is not the widow of Edward C. Kimball, deceased, etc., and the said appeal having been argued by Mr. George Bell, of counsel for the appellant, and Mr. L. H. Arnold, of counsel for the respondent, and due deliberation having been had thereon, and the court having unanimously decided that the findings of fact by the surrogate are supported by the evidence,

109 It is hereby ordered and adjudged that the decree so appealed from be and the same is hereby affirmed, with costs. Enter.

WM. W. GOODRICH, *P. J.*

At a surrogate's court, held in and for the county of Kings, at the surrogate's office, in the hall of records, on the 28th day of June, 1897.

Present: Hon. George B. Abbott, surrogate.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th day of November, 1896.

*Decree on Order of Affirmance.*

An appeal having been taken by Maude E. Kimball to the appellate division of the supreme court from a decree made by this court herein on the 8th day of March, 1897, denying the application made by said Maude E. Kimball for the revocation of letters of administration heretofore and on the 10th day of November, 1896,

issued to Harriet A. Kimball and John S. James of the goods,  
 110 chattels and credits which were of Edward C. Kimball, deceased; and it appearing to this court from the remittitur from the appellate division of the supreme court, second department, that said appeal came duly on to be heard by said court, that said court unanimously decided that the findings by the surrogate were supported by the evidence, and that on the 22d day of June, 1897, said court made an order affirming said decree so appealed from, with costs;

And the costs of Harriet A. Kimball, Harriet I. James and John S. James, the respondents on said appeal, having been duly adjusted by the clerk of this court at ninety-eight  $\frac{32}{100}$  dollars;

Now, on reading and filing the said remittitur from the appellate division of the supreme court, and on all the other papers and proceedings herein, on motion of Arnold & Greene, attorneys for said Harriet A. Kimball, Harriet I. James and John S. James, it is

Ordered, adjudged and decreed that Harriet A. Kimball, Harriet I. James and John S. James recover from said Maude E. Kimball the sum of ninety-eight  $\frac{32}{100}$  dollars as and for their costs of the said appeal as taxed, and that they have execution against her therefor.

GEORGE B. ABBOTT, *Surrogate*.

110 $\frac{1}{2}$  STATE OF NEW YORK, } ss:  
                   County of Kings, }

I, Joseph W. Carroll, clerk of the surrogate's court in and for the said county of Kings, do hereby certify that I have compared the foregoing copy of the record of the proceedings in the surrogate's court, Kings county, upon which the surrogate acted in making the decree appealed from, together with the judgment entered by the surrogate, based on the order of the appellate division affirming the said surrogate's decree, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of said surrogate's court this 11th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

[L. S.]

JOSEPH W. CARROLL,

*Clerk of the Surrogate's Court.*

110 $\frac{1}{2}$  STATE OF NEW YORK, } ss:  
                   County of Kings, }

I, Jacob Worth, clerk of the county of Kings, and clerk of the supreme court of the State of New York, in and for said county (said court being a court of record), do hereby certify that  
 [L. S.] I have compared the annexed with the original notice of appeal to the court of appeals filed in my office August 19, 1897, and that the same is a true transcript thereof and of the whole of such original.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court, this 11th day of October, 1897.

JACOB WORTH, *Clerk*.

111

## Supreme Court, County of Kings.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896. MAUDE E. KIMBALL, Petitioner and Appellant.

*Notice of Appeal.*

Take notice that the above-named Maude E. Kimball, petitioner and appellant, hereby appeals to the court of appeals of the State of New York from the order made in the above-entitled matter by the appellate division of the supreme court in and for the second judicial department, and entered in the office of the clerk of the county of Kings, on the twenty-second day of June, 1897, affirming the decree of the surrogate's court of the county of Kings, entered in the above-entitled matter on the 8th day of March, 1897, with costs, and from each and every part of said order.

Dated August 19th, 1897.

WALDEGRAVE HARLOCK,

*Attorney for Maude E. Kimball, Petitioner and Appellant.*

To the clerk of the county of Kings, and to Arnold & Greene, Esqrs., attorneys for the respondents, Harriet A. Kimball, John S. James and Harriet I. James.

## 112 Supreme Court, Appellate Division, Second Department.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, &c.

MAUDE E. KIMBALL, Appellant,  
*against*

HARRIET A. KIMBALL, HARRIET I. JAMES, and JOHN S. JAMES,  
Respondents. }

*Opinion.*

Appeal from a decree of the surrogate of Kings county denying an application for the revocation of letters of administration of the goods and credits of Edward C. Kimball, deceased.

George Bell, for appellant.

L. H. Arnold, for respondents.

GOODRICH, P. J. :

The intestate died, November 9, 1896. On the next day a petition was filed with the surrogate of Kings county by Harriet A. Kimball, his mother, alleging that the intestate was unmarried and left him surviving no widow. Whereupon, on the same day,  
113 letters of administration were granted to her and John S. James, her son-in-law. The appellant, Maude E. Kimball,

on December 17, filed a petition to revoke these letters of administration, asking for the issue of letters to herself and alleging that she was the widow of the intestate, having been married to him in the city of Brooklyn on June 29, 1895, by Rev. W. C. P. Rhoades, pastor of the Marcy Ave. Baptist church; that she and the intestate lived together as husband and wife at Seacliff until September 7, when they went to housekeeping at 483 Decatur street, Brooklyn, and continued to live together until January 3, 1896, when the intestate went to Easton, Pennsylvania, to engage in business, and she returned to her mother's house owing to the failure of the intestate to support her; that she was introduced by the intestate as his wife and that visits were exchanged with Harriet A. Kimball.

The application was opposed by the mother and sister of the intestate on the ground that the petitioner was not the widow of the deceased. They admitted that a ceremony of marriage had taken place between her and the intestate, but alleged that the marriage was invalid because she had married on May 12, 1885, one James L. Semon, at the city of New York, and that in September, 1890, she instituted an action for divorce in the district court of the fifth judicial district of the State of North Dakota; that Semon was then and ever since a resident of this State; that an order was made directing the service of the summons by publication; that a copy of the same was served on Semon at the city of New York, and that he did not appear, answer or demur in the action; that these facts were recited in the final decree of divorce of January 26, 1891; that by reason of these facts the court did not acquire jurisdiction of

114 Semon, and that the decree of divorce was absolutely null and void in this State, so that the appellant could not lawfully contract marriage with the intestate, and that her alleged marriage with the intestate was null and void.

If these allegations were assumed to be true, we would have no difficulty in deciding this controversy. It was said, in *Kamp vs. Kamp* (59 N. Y., 212, 215), that "the general rule is that a party cannot appeal from one judge to another of co-ordinate jurisdiction, by motion for relief, from an order or judgment against him, but must seek his remedy by appeal to a tribunal having appellate jurisdiction in the premises. But the question has usually arisen in cases where the court making the order has had jurisdiction of the subject-matter and of the person of the party against whom the order or judgment has passed. The reason of the rule, which is simply one of convenience, does not apply when the court is entirely without jurisdiction, and the whole proceeding, including the order or judgment, is *coram non judice* and void. One is not bound to appeal from a void order or judgment, but may resist it and assert its invalidity at all times."

In *The People vs. Baker* (76 N. Y., 78, 82), the defendant was indicted for bigamy. It appeared that a decree of divorce had been obtained in an action in the court of common pleas in Ohio, where the record showed that the process had been served on the defendant by publication, and that there was no personal appearance by him in the action. This decree was regular and sufficient, and the

judgment binding under the laws of Ohio. Judge Folger, writing the opinion, said: "As we look at this case, it presents this question: Can a court, in another State, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the  
115 judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that State?" This question the court decided in the negative and affirmed the conviction of the defendant for bigamy, so that the question is no longer an open one in this State.

The question, however, is complicated by subsequent proceedings and an amendment *nunc pro tunc* of the decree of the North Dakota court. A few weeks after the issuing of the letters of administration, Mr. Semon filed a petition in that court, alleging that after service upon him of the process within the State of New York, which required the answer within thirty days, he did, on October 23, 1890, prepare and verify what he calls an answer to the complaint and served it by mail upon the plaintiff's attorneys in that action; that he did this without advice of counsel, and that it was his intention to inform the court of his position and defense and to submit himself to the jurisdiction of the court, and that he believed this course was sufficient and that his answer would be filed. Annexed to his petition was the paper referred to and an affidavit from one of the plaintiff's attorneys, admitting its receipt and stating that the same had been lost or destroyed and was never filed by them, because it was not in the form of a pleading according to the statutes of that State.

The court directed the filing of the defendant's letter as of the date when it was received by the plaintiff's attorneys, apparently, October 28, 1890, and ordered that the decree "be amended *nunc pro tunc* as of the 26th day of January, 1891, by striking out therefrom the recitals setting forth 'that the defendant failed to answer, demur or make any appearance whatever, as by the summons and the law  
116 required in such case, but instead thereof made default; that upon such default,' and by inserting in lieu thereof the following words: 'The defendant having appeared herein and answered and submitted himself to the jurisdiction of the court.'"

The question presented for our consideration is whether the status of the petitioner is determined by the amendment of the decree *nunc pro tunc*, and whether the decree thus amended can be attacked on the ground that the court was without jurisdiction. The practice of North Dakota is generally similar to our own. Section 5341 of the Code of Dakota, which was made part of the law of North Dakota when that State was admitted to the Union, provides that it shall not be necessary to entitle an affidavit in an action, but an affidavit without a title or with a defective title shall be as effectual for every purpose as if it were duly entitled, if it intelligently refer to the action or proceeding in which it is made. Such also is the similar provision of section 728 of our own Code of Civil Procedure. To the letter of Semon was attached an affidavit dated October 23,

1890, which, although quite informal as a verification of a pleading, declared that the letter was "absolutely true in every particular." The district court of North Dakota held that it constituted a proper appearance and answer, ordered it to be filed as such and amended the decree *nunc pro tunc*, as already stated. The code of that State contains sections substantially similar to sections 723 and 724 of our own code, providing for the amendment, before or after judgment, of all papers and proceedings in furtherance of justice.

It is well settled law in this State that the recitals in a judgment that a defendant was served with process and appeared therein is not conclusive and does not preclude such defendant from showing that in fact he was not served with process and did not appear, and that there is no distinction in these respects between the effect of domestic and foreign judgments (*Ferguson vs. Crawford et al.*, 70 N. Y., 253).

A similar question to the one here involved was under consideration in *Kerr vs. Kerr* (41 N. Y., 272). The surrogate of Kings county, in August, 1867, granted to the plaintiff, Jane Kerr, claiming to be the widow of Richard Kerr, letters of administration upon the estate of Richard. Subsequently, the defendant, Jane F. Kerr, applied for a revocation of the letters on the ground that she, and not Jane, was the widow. Jane answered that she had married Richard in February, 1867. It appeared that in July, 1866, and before his marriage with Jane, Richard had obtained a divorce from a former wife in an Indiana court, the decree reciting the appearance of the wife in the action. The surrogate decided and the court of appeals affirmed his decision, holding that the judgment might be inquired into and the fact shown that there was no such appearance, and that the Indiana court had not acquired jurisdiction. It will be observed that this attack was made upon the decree by a stranger and not by a party to it, and was permitted because property rights were affected by it.

The surrogate in this proceeding has found as a matter of fact that the appellant and Semon were married in New York on May 12, 1885; that ever since that marriage he was a resident of this State, and that the appellant commenced her action for divorce in North Dakota, but that her husband was not served with process in that action in said State and did not appear therein. He finds as a conclusion of law that the North Dakota court did not acquire jurisdiction of the husband and that when the appellant entered into the marriage ceremony with the intestate she was still the wife of Semon and could not contract a lawful marriage with the intestate, and therefore is not his widow.

118 It is not necessary for us to decide whether the rights of the intestate's next of kin can be affected by the amendment of the decree, made after his death. It is sufficient for us to say that we can see no reason for disturbing the findings and conclusions of the surrogate, for the reasons already stated. He was justified by the evidence in his decision. It is at least a very curious and suggestive coincidence that as soon as the validity of the appellant's divorce had been practically attacked by the granting of letters of



administration to the next of kin, the former husband of the appellant at once applied for an amendment of the decree which adjudged him guilty of moral obliquity in failing to discharge his marital obligations, not for the purpose of having it vacated and being relieved from the imputation which it carried, but to give life and force to the charges against himself, and for this purpose submit himself to the jurisdiction of the court and assent to the judgment. The story of his appearance and answer is apocryphal and challenges credulity, and the surrogate appears to have been of this opinion.

We see no reason to differ with his conclusion. The decree should be affirmed.

119 STATE OF NEW YORK, ss:

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 4th day of February, in the year of our Lord one thousand eight hundred and ninety-eight, before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk*.

Remittitur February 4th, 1898.

In the Matter of the Application for Letters of Administration, etc.,  
of EDWARD C. KIMBALL, Deceased, etc.

Be it remembered that on the 15th day of October, in the year of our Lord one thousand eight hundred and ninety-seven—

Maude E. Kimball, the appellant in this proceeding, came here into the court of appeals, by Waldegrave Harlock, her attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the second judicial department, and Harriet A. Kimball and 120 others, the respondents in said proceeding, afterward appeared in said court of appeals, by Arnold and Greene, her attorneys; which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Thomas Allison, of counsel for the appellant, and by Mr. L. H. Arnold, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is, affirmed with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the surrogate's court of the county of Kings, there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed with costs.

And thereupon as well as the notice of appeal and return thereto



aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the surrogate's court of the county of Kings, before the surrogate thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said surrogate's court before the surrogate thereof, &c.

W. H. SHANKLAND,

*Clerk of the Court of Appeals of the State of New York.*

121

Court of Appeals, Clerk's Office.

ALBANY, *February 4th*, 1898.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.]

W. H. SHANKLAND, *Clerk.*

122

At a surrogate's court, held in and for the county of Kings, at the surrogate's office, in the hall of records, in the borough of Brooklyn, city of New York, on the 7th day of February, 1898.

Present: Hon. George B. Abbott, surrogate.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

An appeal having been taken by Maude E. Kimball, the petitioner herein, to the court of appeals from the order of the appellate division of the supreme court in and for the second judicial department, entered in the office of the clerk of the county of Kings on the 22nd day of June, 1897, affirming the decree of the surrogate's court of the county of Kings entered in the above-entitled matter on the 8th day of March, 1897, with costs:

Now, on reading and filing the remittitur of the court of appeals in the above-entitled matter, by which it appears that said order so appealed from was in all respects affirmed with costs, on motion of Arnold & Greene, attorneys for Harriet A. Kimball & others, the respondents on said appeal, it is—

Ordered, adjudged, and decreed that the order of the court of appeals in the above-entitled matter be, and the same hereby  
123 is, made the order or decree of this court, and that said respondents have execution therefor.

GEO. B. ABBOTT, *Surrogate.*

A copy.

[SEAL.]

JOSEPH W. CARROLL,

*Clerk of the Surrogate's Court.*

124 [Endorsed:] N. Y. surrogate's court, Kings county. In the matter of the application for letters of adm'n, &c., of Edward C. Kimball, deceased, and for revocation of letters, &c. (Copy.) Order filing remittitur. Arnold & Greene, attorneys for resp'd'ts, 3 Broad street, New York city. To W. Harlock, Esq., attorney for Maud E. Kimball, appellant.

SIR: Take notice that the within is a true copy of an order herein, which was this day duly entered and filed in the office of the clerk of the surrogate's court of the county of Kings, in the hall of records, in the city of New York, borough of Brooklyn.

Dated New York this 7th day of February, 1898.

Yours, &c.,

ARNOLD & GREENE,  
*Attorneys for Harriet A. Kimball, Respondent,*  
3 Broad Street, New York, N. Y.

To W. Harlock, Esq., attorney for Maud E. Kimball, appellant.

Rec'd Feb. 7, '98.

W. H.

125 Surrogate's Court, County of Kings.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

An appeal having been taken by Maude E. Kimball, the petitioner herein, to the court of appeals from the order of the appellate division of the supreme court in and for the second judicial department, entered in the office of the clerk of the county of Kings on the 22nd day of June, 1897, affirming with costs the decree of the surrogate's court of the county of Kings entered in the above-entitled matter on the 8th day of March, 1897, and the said court of appeals having sent hither its remittitur filed herein on the 7th day of February, 1898, by which it appears that the said order so appealed from was in all respects affirmed with costs and has given judgment accordingly and has remitted the judgment of the said court of appeals to this court to be enforced according to law, and this court having, by an order entered herein the 7th day of February, 1898, ordered, adjudged, and decreed that the order of the court of appeals be made the order or decree of this court with costs, and the said costs having been adjusted by this court at the sum of \$111.05:

Now, on motion of Arnold & Greene, attorneys for Harriet A. Kimball and others, respondents herein, it is—

126 Ordered, adjudged, and decreed that the order of the court of appeals in the above-entitled matter be, and the same hereby is, made the order or decree of this court, and that Harriet A. Kimball, Harriet I. James, and John S. James, the respondents on said appeal, do recover of Maude E. Kimball, the appellant on

said appeal, the sum of \$111.05 as and for their costs and disbursements on the appeal to the court of appeals, and that they have execution therefor.

Dated February 9th, 1898.

GEO. B. ABBOTT, *Surrogate*.

(Certificate.)

127 [Endorsed:] Surrogate's court, Kings county. In the matter of the application for letters of administration of the goods, &c., of Edward C. Kimball, deceased, and for the revocation of letters, &c. (Copy.) Final decree. Arnold & Greene, attorneys for resp'd'ts, 3 Broad street, New York city. To W. Harlock, Esq., attorney for appellant.

SIR: Take notice that the within is a true copy of the final decree herein, which was this day duly entered and filed in the office of the clerk of the surrogate court of Kings county, in the hall of records, borough of Brooklyn, in the city of New York.

Dated New York this 10th day of February, 1898.

Yours, &c.,

ARNOLD & GREENE,

*Attorneys for Respondents, 3 Broad Street, New York, N. Y.*

To W. Harlock, Esq., attorney for appellant.

Rec'd Feb. 10, '98.

W. H.

128 UNITED STATES OF AMERICA, 88:

Seal of the Supreme  
Court of the United  
States.

The President of the United States of America to the honorable the surrogate of the county of Kings, in the State of New York, and to the surrogate court of the said county of Kings, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said surrogate court on a remittitur from the court of appeals of the State of New York, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit or proceeding entitled "In the matter of the application for letters of administration of the goods, chattels, and credits which were of Edward C. Kimball, deceased, and for the revocation of the letters issued to Harriet A. Kimball and John S. James on the 10th day of November, 1896," in which proceeding one Maude E. Kimball was the petitioner and Harriet A. Kimball, John S. James, and Harriett I. James were the respondents, being all the parties to said suit or proceeding, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in

favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or  
 129 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Maude E. Kimball, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,

*Clerk of the Supreme Court of the United States.*

Allowed by—

DAVID J. BREWER,

*Associate Justice Sup. Ct. U. S.*

130 [Endorsed:] Writ of error. W. Harlock, attorney for Maude E. Kimball, the within-named petitioner and plaintiff in error, 20 Nassau St., New York city, N. Y.

131 Supreme Court of the United States.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896. MAUDE E. KIMBALL, Petitioner.

*Bond for Damages and Costs.*

Know all men by these presents that we, Maude E. Kimball, William McKee, and Sarah C. McKee, each residing at No. 1170 Dean street, in the city of Brooklyn, county of Kings, and State of New York, are held and firmly bound unto the above-named Harriet A.

and Harriet I. James

Kimball and John S. James a in the sum of four hundred C. J. S. dollars, to be paid to the said Harriet A. Kimball and and Harriet I. James

John S. James a for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our

heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fifteenth day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas the above-named Maude E. Kimball has prosecuted a writ of error to the Supreme Court of the United States to reverse the final decree rendered in the above-entitled proceeding by the surrogate's court of Kings county, in the State of New York, on a remittitur from the court of appeals of the State of New York :

Now, therefore, the condition of this obligation is such  
132 that if the above-named Maude E. Kimball shall prosecute said writ of error to effect and answer all damages and costs if she fail to make said writ of error good, then this obligation shall be void ; otherwise the same shall be and remain in full force and virtue.

MAUDE E. KIMBALL. [SEAL.]  
WILLIAM McKEE. [SEAL.]  
SARAH C. McKEE. [SEAL.]

Sealed and delivered and taken and acknowledged this 15th day of February, 1898, before me, at Brooklyn, N. Y.

CHAS. J. SANDS,

[SEAL.]

*Notary Public, Kings County, N. Y.*

Approved by—

(Signed) DAVID J. BREWER,

*Associate Justice Sup. Ct. U. S.*

Feb'y 16th, '98.

UNITED STATES OF AMERICA, }  
State of New York, County of Kings, } ss :

William McKee, being duly sworn, deposes and says that he is a resident and freeholder within the State of New York, and that he is worth more than the sum of five thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from levy and sale under an execution.

WILLIAM McKEE.

Sworn to before me this 15th day of February, 1898.

CHAS. J. SANDS,

[SEAL.]

*Notary Public, Kings County, N. Y.*

133 UNITED STATES OF AMERICA, }  
State of New York, County of Kings, } ss :

Sarah C. McKee, being duly sworn, deposes and says that she is a resident and freeholder within the State of New York, and that she is worth more than the sum of five thousand dollars over and above all her just debts and liabilities and exclusive of property exempt by law from levy and sale under an execution.

SARAH C. McKEE.

Sworn to before me this 15th day of February, 1898.

CHAS. J. SANDS,

[SEAL.]

Notary Public, Kings County, N. Y.

134 [Endorsed:] Supreme Court of the United States. In the matter of the application for letters of administration of the goods, chattels, and credits which were of Edward C. Kimball, deceased, and for the revocation of the letters issued to Harriet A. Kimball and John S. James on the 10th day of November, 1896. Maude E. Kimball, petitioner. Copy. Bond for damages and costs on writ of error.

135 Supreme Court of the United States.

MAUDE E. KIMBALL, Plaintiff in Error,	} Assignment of Errors.
<i>against</i>	
HARRIET A. KIMBALL, JOHN S. JAMES, and	
HARRIET I. JAMES, Defendants in Error.	

Afterwards, to wit, on the 16th day of February, 1898, at the October term for 1897 of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes Maude E. Kimball, by Waldegrave Harlock, her attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I. That the decree of divorce granted to Maude E. Semon, now Maude E. Kimball, by the district court of the fifth judicial district of the State of North Dakota, dated the 26th day of January, 1891, in the action of Maude E. Semon, plaintiff, *vs.* James L. Semon, defendant, dissolving the bonds of matrimony between said Maude E. Semon and James L. Semon, was a good and valid decree and was not void.

II. That the said decree of divorce granted by the district court of the fifth judicial district of the State of North Dakota, dated January 26th, 1891, dissolving the bonds of matrimony between James

136 L. Semon and said Maude E. Kimball, therein called Maude E. Semon, was, prior to the amendment thereof and as and in the form and manner in which said decree was originally made, signed, entered, and docketed, a good and valid decree, and was not void, and was binding upon the parties to this proceeding, and that the said surrogate's court and other aforesaid courts in the State of New York erred in not so holding and in not making a decree herein accordingly.

III. That the decree of divorce granted by the district court of the fifth judicial district of the State of North Dakota, dated January 26th, 1891, dissolving the bonds of matrimony between James L. Semon and said Maude E. Kimball, in said decree called Maude E. Semon, as amended *nunc pro tunc* as of the date of its original entry, was a good and valid decree, and the order of said court, directing said amendment, dated December 16, 1896, was a good and valid order, and the same were not, nor was either of the same, void, and

that the said surrogate's court and said other courts in the State of New York erred in not so holding and in not making a decree herein accordingly.

IV. That the recital and finding in said decree of the said district court of the fifth judicial district of the State of North Dakota that James L. Semon, the defendant in the divorce action, appeared and answered in said action and submitted himself to the jurisdiction of said court was an adjudication duly made by said court, and that full faith and credit to such adjudication should have been, but

137        were not, given by the aforesaid courts in the State of New York in this suit or proceeding and in the final order or decree herein, pursuant to the Constitution of the United States and the acts of Congress as aforesaid.

V. That by the force and effect of said decree said Maude E. Semon, now Maude E. Kimball, was not the wife of James L. Semon when she married Edward C. Kimball, and by such marriage she became the lawful wife of Edward C. Kimball, and upon the decease of said Kimball she became his lawful widow.

VI. That in violation of section I of article IV of the Constitution of the United States and of the acts of Congress relating to the proof and effect of the judicial proceedings of one State in other States, the courts in the State of New York, to wit, the surrogate's court of the county of Kings, in said State, the appellate division of the supreme court of said State, in the second judicial department, and the court of appeals of said State, in the suit or proceeding at bar and in the final order or decree therein did not give full faith and credit to the said decree of divorce nor to said order amending the same, nor to the record and judicial proceedings of the State of North Dakota in the aforesaid action of Maude E. Semon *versus* James L. Semon, in which said decree of divorce and order were made.

Wherefore the said Maude E. Kimball prays that the decree herein of the surrogate's court of the county of Kings, in the State of New York, on the remittitur of the court of appeals of the  
138        State of New York, be reversed and the said surrogate's court be ordered to grant the prayer of the petitioner, Maude E. Kimball, contained in her petition herein, dated December 17th, 1896.

Dated February 16th, 1898.

W. HARLOCK,

*Attorney for Plaintiff in Error.*

139        [Endorsed:] Supreme Court of the United States. Maude E. Kimball, plaintiff in error, against Harriet A. Kimball, John S. James, and Harriet I. James, defendants in error. Original. Assignment of errors. W. Harlock, attorney for plaintiff in error, 20 Nassau street, New York, N. Y.



## 140 UNITED STATES OF AMERICA, ss:

To Harriet A. Kimball, John S. James, and Harriet I. James, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the surrogate's court of the county of Kings, in the State of New York, wherein Maude E. Kimball is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 16th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

DAVID J. BREWER,

*Associate Justice of the Supreme Court of the United States.*

141 [Endorsed:] Citation on writ of error.

On this 18th day of February, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared Rudolph H. Ehrsam before me, the subscriber, a notary public in and for the county of Kings, State of New York, duly commissioned and sworn, and makes oath that he delivered a true copy of the within citation to Arnold and Greene, the attorneys for the defendants in error, on the 17th day of February, 1898, at their office, in the city of New York, by delivering the same to Lemuel H. Arnold, one of said attorneys for said defendants in error, in person, at said office, and leaving the same with him.

RUDOLPH H. EHRSAM.

Sworn to and subscribed the 18th day of February, A. D. 1898.

JOS. W. DUFFY,

*Notary Public, Kings County, New York.*

142 STATE OF NEW YORK, } ss:  
County of Kings,

I, Joseph W. Carroll, clerk of the surrogate's court in and for the said county of Kings, do hereby certify that the foregoing is a full, true, and complete record of all proceedings had in the surrogate's court, Kings county, New York, "in the matter of the application for letters of administration of the goods, chattels, and credits which were of Edward C. Kimball, deceased."

In testimony whereof I have hereunto set my hand and affixed the seal of said surrogate's court this 18th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

[Kings County Surrogate Seal.]

JOSEPH W. CARROLL,

*Clerk of the Surrogate's Court.*

- 143 In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased.

(Decided February 4, 1898.)

Appeal by Maude E. Kimball from an order of the appellate division, second department, affirming a decree of the surrogate's court of Kings county denying her petition for the removal of Harriet A. Kimball and John S. James, as executrix and executor, and for the appointment of herself as executrix in their place and stead, of the goods, chattels, and credits which were of Edward C. Kimball, deceased.

Thomas Allison and W. Harlock, for appellant.  
Arnold & Greene, for respondents.

HAIGHT, J.:

Edward C. Kimball died in the city of Brooklyn on the 9th day of November, 1896, intestate, leaving him surviving Harriet A. Kimball, his mother, and Harriet I. Kimball, his sister, as his only next of kin and heirs-at-law. On the 10th day of November letters of administration were issued upon his estate by the surrogate of Kings county to Harriet A. Kimball and John S. James. On the 17th day of December thereafter, one Maude E. Kimball, claiming to be the widow of the deceased, filed a petition with the surrogate praying for the revocation of the letters of administration issued to Harriet A. Kimball and John S. James and for the appointment of herself in their place and stead. It appears that she was married on the 12th day of May, 1885, to one James L. Semon, in the city of New York, and that they resided together as husband and wife for a number of years, during which time two children were born to them; that in the month of June, 1890, she left her husband in the city of New York and removed to the State of North Dakota where she took up her residence, and after remaining in that State for a period of ninety days, instituted an action in the district court of the fifth judicial district of that State for a divorce. She procured the summons to be served upon Semon in the city of New York where he still continued and ever since has resided. The summons required him to appear and answer the complaint within thirty days after the service, and in default of so doing, the plaintiff would apply to the court for the relief demanded in the complaint. On the 31st day of December thereafter, the plaintiff's attorney made an affidavit to the effect that more than thirty days had elapsed since the service of the summons was made upon the defendant, and that no answer or demurrer to the complaint in the action had been received by him, and that the said defendant had not made, served or filed any appearance in any manner in the action. Upon this affidavit an application was made to the court for the appointment of a referee to take proof as to the facts alleged in the complaint, and upon the report subsequently made by the referee, judgment was entered annulling the marriage

and granting her a divorce. About the 5th day of February, 1891, she returned to the city of New York, and on the 29th day of June, 1895, was married to Edward C. Kimball in the city of Brooklyn. They thereafter lived together until about the 3d day of January, 1896, when Kimball left her and went to Easton, Pa., to engage in business. He died, as we have seen, the following November. Kimball knew at the time of his marriage that the petitioner was a divorced woman, but he had no knowledge of the means by which such divorce had been obtained and did not know that it was invalid. After his death and in December, 1896, Semon, the former husband of the petitioner, applied to the Dakota court which granted the decree of divorce to have a letter which he sent to the plaintiff's attorney, filed in the court as his answer in the divorce suit *nunc pro tunc* as of the date of its receipt by the plaintiff's attorney, and to have the decree of divorce, made on the 26th day of January, 1891, amended *nunc pro tunc* as of that date, by striking out the recital to the effect that the "defendant had failed to answer, demur or make appearance in the action," and by inserting in place thereof the words, "The defendant having appeared herein and answered and submitted himself to the jurisdiction of the court." Notice of this application was given to the plaintiff's attorney who appeared in the divorce suit, but no notice was given to the personal representatives of the deceased. No one appearing to oppose, the motion was granted by the court and the judgment was amended *nunc pro tunc* as prayed for.

It is now contended that the judgment of the Dakota court, awarding to the petitioner a divorce from her former husband, is valid and binding upon the parties, and that by reason thereof she had a lawful right to marry Kimball, and that, as his widow, she is entitled to letters of administration upon his estate and to share in the proceeds thereof.

The provision of the Constitution of the United States, which declares that full faith and credit shall be given in each State to the judicial proceedings of every other State; and the acts of Congress, which declare that the judgments of the State courts shall have the same faith and credit in other States as they have in the State where they were rendered, have repeatedly been held not to prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered, nor into the rights of the State to exercise authority over the parties or subject-matter, nor an inquiry whether the judgment is founded on or impeachable for fraud; and that such a judgment may be inquired into, although the record states facts which would give the court jurisdiction. It is equally well settled that the judgment of a court of a sister State has no binding effect in this State, unless the court had jurisdiction of the subject-matter and of the person of the parties, and that want of jurisdiction may always be interposed against a judgment when it is sought to be enforced, or when any benefit is claimed for or under it. (*Burden v. Fitch*, 15 Johns. 121; *Andrews v. Montgomery*, 19 Johns. 162; *Shumway v. Stillman*, 3 Cow. 372; *Kerr v. Kerr*, 41 N. Y. 272.)

145 It will not be claimed that the judgment as originally entered was valid. It recited the service of the summons outside of the State; that the defendant had not answered, demurred, or in any manner appeared in the action. The defendant was a resident of this State, and the courts of Dakota had never acquired jurisdiction of his person so as to have the power to order a judgment *in personam* against him. It is only upon the theory that he served an answer in that case, thereby submitting himself to the jurisdiction of that court, that it can be claimed that the courts of that State acquired jurisdiction to grant a final judgment against him. As we have seen, the plaintiff's attorney in that action made an affidavit upon which the judgment was entered, in which he stated that the defendant had not appeared, and had not answered or demurred. It is now claimed, however, that he had forwarded to the plaintiff's attorney a letter, of which the following is a copy:

"NEW YORK, Oct. 23, '90.

"Mr. Herman Winterer.

"DEAR SIR: In reply to the contents of paper served on me Oct. 15, 1890, by your representative, relative to my wife and children, I would say that my (wife) has sworn to matters untrue. For instance, this matter of desertion, this is surprising to me, as my wife personally ordered me from the house and stated that she never wished to see me again; this was the fore part of September, 1888. I did as I was ordered, having no alternative, as I was living under her mother's roof. Now is it at all likely that a domesticated man (as my wife will tell you I was) would give up a good home, without good reasons for so doing? It was only a short time after I left the house that they moved and took up another dwelling place, I never receiving any notification where I could see my children. I have meditated over this matter more than once, and have often wondered why it was done. It is now over a year ago since I saw my children last.

"In relation to my not providing for her, I would say that I have always given what I had, and very often more than I could afford. I am now carrying on the painting business, which was left to me by my father, who is now dead. When I came into possession of the business it was very much in debt. I have been trying ever since I took it to wipe out this burden, but as yet have not fully accomplished my aim and desire. There were times when I was not doing very much in my business, and consequently could not provide as promptly as I would like to. My wife swearing that I did not provide for her the common necessities of life simply tells an untruth. As to my drinking habits, I will admit that I have indulged a little too much at times, but now have got bravely over that, having not tasted it in over a year. As the father of my children, I was glad to hear of their existence, and hope in the near future of having the pleasure of seeing my own flesh and blood.

"Very respectfully,

JAS. L. SEMON,

"803 9 Ave. N. Y. C.

146 "CITY AND COUNTY OF NEW YORK, ss :

"Jas. L. Semon, being duly sworn, deposes and says that he is the writer of the foregoing letter, that he knows the contents thereof, and that it is absolutely true in every particular.

"JAS. L. SEMON. [L. s.]

"Subscribed and sworn to before me this 23d day of October, 1890.

"[L. s.]

JAS. T. CLARK,  
"Notary Public for Co. of N. Y."

Is this letter an appearance in the case or an answer to the plaintiff's complaint? Under the Compiled Laws of the State of North Dakota it is provided by section 4914 that "the answer of the defendant must contain, first, a general or specific denial of each material allegation of the complaint controverted by the defendant or of any knowledge or information thereof sufficient to form a belief." Section 4921 provides that "every pleading in a court of record must be subscribed by the party or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also." By referring to the paper which is now claimed to be an answer, we find it dated at New York and addressed to the plaintiff's counsel individually. It is in form an ordinary letter commencing "Dear Sir" and closing with the words "Very respectfully" and is signed "Jas. L. Semon." It is not entitled in any action in any court of any State. It does not purport to be a pleading in any action. It contains no specific denials of the allegations of the complaint which for a moment could be held to frame an issue requiring a trial. It is verified, but not in the form required by the statute. Semon nowhere swears that he is the defendant in the action or the person that was required to answer the complaint. This is the evidence upon which the surrogate was required to determine the validity of the judgment. Upon this evidence he found, as a fact, that the defendant did not appear in the action in person or by attorney. This finding has been affirmed by the unanimous judgment of the appellate division and under the provisions of our constitution "No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact \* \* \* shall be reviewed by the court of appeals." (Const. art. VI, § 9.) It is claimed, however, that this finding should be regarded as a conclusion of law and not as a determination of a question of fact. If we should so treat it we should not hesitate in sustaining the surrogate. The paper alluded to as an appearance or answer in the action could not be sustained in case it was assailed by a party. The plaintiff's attorney, anxious as he doubtless was to obtain jurisdiction of the defendant, never once thought of the letter as an answer, as is apparent from his affidavit of regularity upon which judgment was entered, and we cannot believe that it would have been received by the Dakota court and made the basis of amending

the judgment had it not been by the consent of the parties.

147 We then have a judgment of a court of a sister State entered against a resident of this State, in which there has been no personal service of process upon him in the jurisdiction of that State or appearance by him in the action by which the courts could acquire jurisdiction of his person. Such a judgment is void and of no force or effect in this State. (*Kerr v. Kerr*, 41 N. Y. 472; *Baker v. Baker*, 76 N. Y. 78; *O'Dea v. O'Dea*, 101 N. Y. 23; *Jones v. Jones*, 108 N. Y. 415; *Cross v. Cross*, 108 N. Y. 628; *De Meli v. De Meli*, 120 N. Y. 485, 495; *Williams v. Williams*, 130 N. Y. 193, 199.)

The order appealed from should be affirmed, with costs.

PARKER, *Ch. J.* (dissenting):

The command of the Constitution of the United States, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," seems to call for a reversal of the order appealed from.

The order affirms the decision of the surrogate of Kings county, declaring, among other things, that a certain decree of divorce made by a court of general jurisdiction in the State of North Dakota was and is a nullity, the reason assigned being that the court did not acquire jurisdiction of the defendant therein, James L. Semon. The provision of the Constitution quoted, said this court many years ago, means that the decree of a sister State, "must have the same faith and credit as it has in the State where it was rendered." (*Kinnier v. Kinnier*, 45 N. Y. 535.) It must, however, be a judgment, and the parties and subject-matter must have been within the jurisdiction of the court; and it is open to attack collaterally as to the question of jurisdiction, as in *Kerr v. Kerr* (41 N. Y. 272) where a decree of the court in the State of Ohio recited an appearance of the defendant by a firm of attorneys, and the person for whom such appearance was noted was permitted to prove that she had no knowledge whatever of the proceeding, and that she neither appeared nor authorized any one to appear for her.

Semon, the defendant in the action that culminated in the judgment which is declared a nullity by the court below, was not a resident of the State of North Dakota, but was a resident of New York, and unless he submitted himself to the jurisdiction of the court of North Dakota by an appearance in the action the judgment of divorce was a nullity. (*O'Dea v. O'Dea*, 101 N. Y. 23.)

The record presents an amended decree in that action which was in existence at the time these proceedings were instituted, and upon the subject of the defendant's appearance the recital therein is as follows: "The defendant having appeared herein and answered and submitted himself to the jurisdiction of the court." When this amended decree was put in evidence, therefore, it was established presumptively that the court making the decree had acquired jurisdiction over the defendant by his appearance therein. It was a presumption rebuttable by proper evidence, if such existed, but

148 in the absence of evidence tending to disprove the assertion of the decree that the defendant had appeared and answered and



submitted himself to the jurisdiction of the court, it was conclusive. It was not attacked by evidence; indeed, there was no evidence in the surrogate's court upon the subject except the papers which were submitted to the Dakota court on the motion made by the defendant Semon to amend the decree in respect to the recital referred to. If the judgment, when first entered, had been in the form in which it now is, as respects the recital, no one would have thought of challenging it, certainly not without direct evidence in possession of the attacking party tending to show that there was no appearance. But the motion to amend the judgment, made by the defendant in that action after the death of the intestate, Kimball, seems to have aroused suspicion that there was some collusion between Semon and his former wife and that his action was taken for her benefit, and not for his own, as he swears. There is, however, no proof that this suspicion is well founded, but if it were otherwise it could not affect the question before us, which is whether the Dakota court had before it competent evidence upon which to base the determination that it had jurisdiction of the defendant Semon at the time of the entry of the judgment, and authority to amend the decree as of that date, so that it should show such jurisdiction. The evidence upon which the court based its decision allowing the amendment is before us, and it cannot be said that it does not furnish support for the determination of the court.

The defendant Semon, who undertook to answer in that action within the time mentioned in the summons and subsequently insisted upon such an amendment of the decree as should recite the fact of his submission to the jurisdiction of the court, does not challenge its jurisdiction. That is attempted by a third party, who produces no other evidence than that submitted by Semon to the court in his petition praying for such an amendment as should recite the jurisdictional facts which existed when the decree was first made. No prior case can be found where it has been held that in such a situation an adjudication of personal appearance can be disregarded, when collaterally attacked by a third party, and the court, of its own head, hold otherwise.

The judgment of divorce was filed January 29th, 1891, and it recited that the defendant Semon had "failed to answer, demur or to make any appearance whatever as by the summons and the law required in such case, but instead thereof made default." If the decree were still in this form the right of the courts in this State to treat it as a nullity would be unquestioned. But about December 1st, 1896, the defendant in that action presented a petition to the court in which he stated, among other things, that eight days after the summons was handed to him in the city of New York, to wit, the 23d of October, 1890, he had prepared his answer to the charges alleged against him in the complaint in the action; had verified it before a notary public in the city of New York; that  
149 it was prepared without the aid or advice of an attorney-at-law, in order to avoid the expense thereof, and that he had mailed it to the attorneys for the plaintiff. He asserts that it was his intention by this answer to inform the court of his position and



defense, and to submit himself to the jurisdiction of the court, and that he then believed such course to be sufficient and that his answer would be filed. Annexed to his petition, and made to form a part thereof, was a copy of the paper referred to and also an affidavit from one of the plaintiff's attorneys, admitting that he had received a letter of which the annexed was a copy, but asserting that it had been lost or destroyed, his omission to file it being due to the fact that it was not in the form of a pleading according to the statutes of that State.

Upon this petition and the papers annexed thereto an order was issued requiring the plaintiff in that action to show cause why the decree should not be amended *nunc pro tunc* as of January 26th, 1891, by striking therefrom the recitals to the effect that the defendant had failed to answer, demur or make any appearance whatever, and inserting therein the words, "the defendant having appeared herein and answered and submitted himself to the jurisdiction of the court."

The practice of North Dakota is similar to our own. Section 5341 of the Code provides that it shall not be necessary to entitle an affidavit in an action, but an affidavit without a title or with a defective title shall be as effectual for every purpose as if it were duly entitled, if it intelligently refer to the action or proceeding in which it was made; this provision is similar to section 728 of our Code of Civil Procedure.

The letter which Semon insists was his answer and so intended, was verified, not in the precise form provided by our statute for the verification of pleadings, but nevertheless it declared that it was "absolutely true in every particular." The district court of North Dakota held that it constituted a proper appearance and answer, ordered it to be filed as such and amended the decree *nunc pro tunc*, so as to recite the appearance of the defendant. The authority to grant the amendment was conferred by section 4938 of the Code of North Dakota, which provides that "the court may before or after judgment, in furtherance of justice, on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." It will be observed that this section is substantially in the language of section 723 of our Code of Civil Procedure.

In granting the order to amend the decree *nunc pro tunc* upon the motion of the defendant in the action, the court necessarily decided what the evidence before it asserted, viz., that the jurisdictional facts existed at the time the original decree was entered. The motion papers tend to show that such was the fact. It was not then disputed, nor has it since been questioned by evidence. The court having reached the conclusion that the recital in the original decree did not state the truth, but was a mistake, had the authority to amend the decree as of the date when

it was first entered so that it should recite the appearance of the defendant. Authority to do so was expressly conferred upon it by the Dakota statute, which, as we have already observed, is substantially the same as our own.

Upon the facts stated would any one question the power of a court of original jurisdiction in this State to grant such an amendment? If granted, would the suggestion be entertained that the judgment could be attacked collaterally without other evidence than that upon which the court based its determination? Certainly not. And it should not be forgotten that it is our duty to give the same force and effect to this determination of our sister State that we would give to it were it made by our own courts.

It is suggested that the learned surrogate's court found as a fact that there was no appearance by the defendant Semon in that action and that we are concluded by his finding. The surrogate found the facts to which I have already referred, and because he saw fit to insert among his findings of fact his conclusion of law that the defendant did not appear, does not deny to us the right, nor relieve us from the duty, of determining what conclusion of law the facts really demanded.

I advise a reversal of the order.

All concur with Haight, J., for affirmance (Martin, J., in result, on the ground that the question whether the defendant appeared in the action for divorce and submitted himself to the jurisdiction of the Dakota court was, under the evidence, a question of fact, and the finding of the surrogate cannot be reviewed by this court), except Parker, ch. J., who writes dissenting opinion.

Order affirmed.

A copy.

E. H. SMITH, *Reporter C.*

[Endorsed:] *In re* Kimball. Haight, J., Parker, ch. J. (dissenting).

Endorsed on cover: Case No. 16,807. New York, Kings county, surrogate's court. Term No., 594. Maude E. Kimball, plaintiff in error, *vs.* Harriet A. Kimball, John S. James, and Harriet I. James. Filed February 21st, 1898.